

THE 15 No
INSTITUTIONS

Francis OF THE *Hargrave*

LAW OF SCOTLAND.

BY

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advocate to King *Charles II.* and to King *James VII.*

THE EIGHTH EDITION, CORRECTED.

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M D C C L V I I I.

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TO THE
Earl of MIDLETON.

MY LORD,

THE natural way of learning all arts and sciences is, to know first the terms used in them, and the principles upon which they are founded, with the origins of the one, and the reasons of the other. A collection of these terms and principles is in law called *Institutions*: and the natural and easy way of writing these is, by going from the first principle to a second, and from that to a third; the admired method of Euclid in his *Elements*, though much neglected by all who have written *Institutions* of law; in which not only many things unnecessary are inserted,

EPISTLE DEDICATORY.

as almost all the third book of Justinian's Institutions, the differences betwixt the *Sabiniani* and *Proculiani*, &c. but many fundamental titles are omitted, as all the matter of Restitutions; and many things are taught in the first book, which cannot be understood till the fourth be read.

I have therefore, in these my Institutions, treated of nothing save terms and principles, leaving out nothing that is necessary, and inserting nothing that is controverted: in all which I have proceeded, building always one principle upon another, and expressing every thing in the terms of the Civil Law, or in the style of ours respectively: so that if any man understand fully this little book, natural reason and thinking will easily supply much of what is diffused through our many volumes of treatises and decisions; whereas the studying those would not in many years give a true idea of our law, and does rather

EPISTLE DEDICATORY.

ther distract than instruct. And I have often observed, that more lawyers are ignorant for not understanding the first principles, than for not having read many books; as it is not much riding, but riding in the known road, which brings a man to his lodging soon and securely.

My Lord, You observed very justly to me, that Institutions are a grammar: and therefore (which is a great encouragement to all readers of Institutions) they who understand the Institutions of any one nation, will soon learn the law of any other: for tho' terms, forms and customs differ, yet the great principles of justice and equity are the same in all nations. I send mine therefore to Your Lordship, not because you need them, but that You may judge if my Institutions will be able to justify Your parallel. Nor find I greater reason for changing my patron in this second edition,

EPISTLE DEDICATORY.

tion, than for changing the principles laid down in the Institutions which I formerly presented to You.

— *Nec Phœbo gratior ulla est,
Quam sibi qui Vari præscripsit pagina nomen.*

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THE
INSTITUTIONS
OF THE
LAW of SCOTLAND.

BOOK FIRST.

TITLE I.

Of laws in general.

1. **J**USTICE is a constant and perpetual will and inclination to give every man what is due to him.

Justice.

2. Law is the science which teacheth us to do justice.

Law.

3. This law, in a large acceptation, is divided, into the law of nature, law of nations, and the civil and municipal law of each particular country.

Division
of law.

A

4. The

Law of
nature.

4. The law of nature comprehends those dictates which nature hath taught all living creatures; instances whereof are self-defence, education of children; and, generally, all those common principles which are common to man and beasts: and this is rather innate instinct than positive law.

Law of
nations.

5. The law of nations is peculiar to mankind only, dictated by right reason, and is divided into the original and primary law of nature, that flows from the first and purest principles of right reason; such as, reverence to GOD, respect to our country and parents; and the secondary and consequential law of nature, consisting of these general conclusions in which, ordinarily, all nations agree, and which they draw, by way of necessary consequence, from those first principles: and under this part of the law of nations are comprehended, the obligations arising from promises or contracts, the liberties of commerce, the ransoming of prisoners, security of ambassadors, and the like.

Civil

6. Civil, or Municipal, laws, are the particular laws and customs of every nation, or people, who are under one sovereign power.

Municipal law.

7. The Romans having studied, with great exactness, the principles of equity and justice, their emperor Justinian did cause digest all their laws into one body, which is now called, by most polite nations, (for its excellency) the Civil Law : and as this Civil Law is much respected generally, so it has great influence in Scotland, except where our own express laws or customs have receded from it †. And by the Common Law in our acts of parliament, is meant the * Civil Law of the Romans.

Roman law.

† Parl.
1584.
c. 13.
* Parl.
1493.
c. 51.
Parl.
1540.
c. 80.
Parl.
1558.
c. 22.
Parl.
1567.
c. 31.

8. The popes of Rome, in imitation of the Civil Law, made a body of law of their own; which, because ecclesiastic laws are called canons, was called the † Canon Law : and though it has here no positive authority, especially since the reformation, as being compiled by private persons, at the desire of the popes, yet our ecclesiastic rights were

† Canon law.

settled thereby before the reformation : and because many things in that law were founded upon material justice, and exactly calculated for all church-men, therefore that law is yet much respected among us, especially in what relates to conscience and ecclesiastic rights.

Municipal law of Scotland.

Acts of parliament.

Acts of sederunt.

* Parl. 1540. c. 93.

Regiam majestatem.

9. Our Municipal Law of Scotland is made up partly of our written, and partly of our unwritten law. Our written law comprehends, first, Our statutory law, which consists of our statutes, or acts of parliament. 2do, The acts of sederunt, which are statutes made by the lords of session, by virtue of a particular act of parliament *, empowering them to make such constitutions as they shall think fit, for ordering the procedure and forms of administering justice ; and these are called acts of sederunt, because they are made by the lords sitting in judgment ; but are not properly laws, the legislative power being the king's prerogative. 3tio, The books of *Regiam Majestatem*, which are generally looked upon as a part of our law, which,

which, with the *Leges Burgorum*, and the other tractates, joined by *Skeen* to them, are called, The old books of our Law, by many express acts of parliament*; though the books of *Regiam Majestatem* were originally but the works of a private lawyer, writing by way of institution, and are now very much abrogated by custom.

* Parl.
1425.
c. 54.
Parl.
1487.
c. 115.

10. Our unwritten law comprehends the constant tract of decisions passed by the lords of session, which is considered as law, the lords respecting very much their own decisions; and though they may, yet they use not to recede from them, except upon grave considerations. *2do*, Our antient customs make up a part of our unwritten law, which have been universally received among us; the tacite consent of king and people operating as much in these, as their express concurrence does in making laws. And such is the force of custom or consuetude, that if a statute, after long standing, has never been in observance, or having been, has run in desuetude; consuetude pre-

Unwritten law.

vails over the statute, till it be renewed either by a succeeding parliament, or by a proclamation from the council: for though the council cannot make laws, yet they may revive them.

Declara-
tory laws.

11. Some laws are called declaratory, because they do not introduce any new law, but declare what formerly was law; and these may look backward, (that is to say) cases even prior to the statute must be regulated by them; though, generally, laws look forward, and regulate only future cases.

12. Laws should command, not persuade; and though the rubric (or title) and narrative of the statute may direct a doubting judge, yet, if the statutory words be clear, they should be followed in all cases.

13. All laws should be so interpreted as to evite absurdities, and as may best agree with the mind of the legislature, and analogy, or general design of the Common Law.

Correc-
tory laws,

14. Correctory laws (so we call these which abrogate or restrict former laws)

are

are to be strictly interpreted; for we should recede as little as can be from received laws.

15. Favourable laws are to be extended; and the parity of reason often prevails with our judges to extend laws to cases that are founded on the same reason with what is expressly determined by the statute.

Favourable laws.

T I T L E II

Of jurisdiction and judges in general.

1. **H**AVING resolved to follow Justinian's method, (to the end there may be as little difference found betwixt the Civil Law and ours as is possible, and that the reader may not be distracted by different methods) I do resolve, first, To lay down what concerns the persons of whom the law treats; 2^{do}, What concerns the things themselves treated of, such as rights, obligations, etc. 3^{tio}, The actions whereby these rights are pursued; which answers to the Civilians' *objecta juris*, viz. *Personæ, res, et actiones*.

Jurisdiction of judges.

Objecta juris

2. The

Persons
civil and
ecclesi-
astic.

2. The persons treated of in law, are either civil or ecclesiastic, the chief of both which, in a legal sense, are judges, with whom we shall begin : and, for the better understanding of their office, it is fit to know, That *jurisdiction is a power granted to a magistrate to cognosce upon, and determine in causes, and to put the sentence or decreet in execution, in such manner as either his commission, law, or practice does allow.*

* Parl.
1661.
c. 2.
Parl.
1681.
c. 18.

3. All jurisdiction flows originally from the king *, so that none have power to make deputies, except it be contained in their commission : and if a deputy appoint any under him, that subdeputy is called, properly, a substitute ; and every judge is answerable for the malversation of his deputy.

Jurisdic-
tion cu-
mulative
and pri-
vative.

4. Jurisdiction is either cumulative or privative. Cumulative jurisdiction is, when two judges have power to judge the same thing ; and generally, it is to be remembered, that the king is never so denuded, but that he retains an inherent power to make other judges, with
the

the same power that he gave in former commissions * ; and thus he may erect lands, into a regality, within the bounds of an heretable sheriff-ship, and burghs royal within the bounds of a regality ; and these bounds, within which a judge may exerce his jurisdiction, is called his territory ; so that, if any judge exercise jurisdiction without his territory, his sentence is null : and, among those who have a cumulative jurisdiction, he who first cites can only judge, and this is called *jus præventionis*.

* Parl.
1681.
c. 18.

5. Privative jurisdiction is, when one judge has the sole power of judging, exclusive of all others ; such power have the lords of session in judging declarators of property, actions of proving the tenor, *cessiones bonorum*, &c.

6. Jurisdiction is founded to any judge, either because the defender dwells within his territory, which is called *Sortiri forum ratione domicilii* : or, 2^{do}, Because the crime was committed within his territory, which is called *Ratione delicti* : or, 3^{tio}, If the person pursued have any
immoveable

immoveable estate within his territory, though he live not within the same, he may be pursued by an action to affect that estate, which is called, *Sortiri forum ratione rei sitæ*.

Proro-
gate ju-
risdicti-
on.

7. A jurisdiction is said to be prorogate, when a person, not otherwise subject, submits himself to it, as when he compares before an incompetent judge, and propones defences.

* Parl.
1661.
c. 11.
† Parl.
1681.
c. 6. 25.

8. All judges, with us, must take the oath of allegiance *, and the test †, whereby they swear, to maintain the government of church and state, as it is now established; and an oath *de fidei administratione*, before they exerce their office: and no excommunicate person, nor rebel against the government, can judge by our law.

Advoca-
tion of
causes.

9. If a person be pursued before a judge, who is not competent, he may complain to the lords of session, and they will grant letters of advocation, whereby they advocate, that is to say, call that cause from the incompetent judge to themselves; and if, after the letters of advocation

advocation are intimated to that judge, he yet proceed, his decree will be null, as given *spreto mandato*.

10. Jurisdiction is either supreme, inferior, or mixed. These courts are properly called supreme, from whom there is no appeal to any higher judicatory, such as the parliament, privy council, lords of session, the criminal court, and exchequer. Inferior judges are such whose decreets and sentences are liable to the review of the supreme courts, as sheriffs, stewards, lords of regality, inferior admirals and commissars, magistrates of burghs royal, barons, and justices of peace. Mixed jurisdiction participates of the nature both of the supreme and inferior courts: such a jurisdiction have the high admiral, and commissars of Edinburgh; both which are in so far supreme, that maritime affairs, and confirmations of testaments, must come in, and be tabled, before the high admiral, and commissars of Edinburgh, in the first instance; as also, they both can reduce the decreets of inferior admirals and

Division
of jurisdic-
tions.

Supreme
courts.

Inferior
courts.

Mixed
jurisdic-
tion.

and commissars: but, seeing their decreets are subject to the review of the lords of session, they are, in so far, inferior courts.

11. No inferior judge can judge in the causes of such as are cousin-germans to him, or of a nearer degree either of affinity or consanguinity; but there is so much trust reposed in the lords of session, that, by a special * statute, they can only be declined in cases relating to their fathers, brothers, or sons, which, by a late statute †, is likewise extended to the degrees of affinity, and the cases of uncles or nephews, by consanguinity; and to the lords of privy council and exchequer, and the commissioners of justiciary, and to all other judges within the kingdom.

* Parl.
1594.
c. 212.
n. 2.

† Parl.
1681.
c. 13.

Privilege
of the
college of
justice.

* Parl.
1663.
c. 9.

12. The members of the college of justice have this privilege, that they cannot be pursued before any inferior judge; and if they be, the lords will advocate the cause to themselves. No cause within 200 merks is to be advocate to the lords from the judge competent *.

TITLE

T I T L E III.

Of the supreme judges and courts of Scotland.

1. **T**HE king is the author and fountain of all power, and is an absolute prince, having as much power as any king or potentate whatsoever*, deriving his power from GOD almighty alone ‡, and so not from the people. The special privileges that he has are called his prerogative royal; such as, that he only can make peace or war, call parliaments, conventions, convocations of the clergy, make laws*: and generally, all meetings called without his special command are punishable †. He only can remit crimes, legitimate bastards, name judges and counsellors, give tutors-dative, and naturalize strangers: and is supreme over all persons, and in all causes, as well ecclesiastic as civil*.

2. The parliament of old was the king's baron-court, in which all freeholders were

B

obliged

* Parl.
1606.
c. 1.

‡ Parl.
1661.
c. 5. 15.

* Parl.
1681.
c. 2.

† Parl.
1661.
c. 3. 11.

* Parl.
1661.
c. 4.
Parl.
1633.
c. 3.
Parl.
1669.
c. 1.

obliged to give suit and presence, in the same manner that men appear yet at other head courts. And therefore, since we had kings before we had parliaments, it is evident that the king's power flowed not from them.

3. The parliament is called by proclamation, now, on forty days; though it may be adjourned by proclamation, on twenty days preceeding the prefixed day at which it should have met: but of old it was called by briefes out of the chancellary. It consists of three estates, *viz.* The archbishops and bishops; and, before the reformation, all abbots and mitred priors sat as churchmen: *Secundo*, The barons, in which estate are comprehended all dukes, marquisses, earls, viscounts, lords, and the commissioners for the shires; for of old all barons who held of the king did come; but the estates of lesser barons not being able to defray this charge, they were allowed to send commissioners for every shire †; and, generally, every shire sends two, who have their charges born by the shire: *Tertio*, The commissioners for

† Parl.
1427.
c. 101.
Parl.
1587.
c. 114.

for burghs royal, each whereof is allowed one, and the town of Edinburgh two. Though all the three estates must be cited, yet the parliament may proceed albeit any one estate were absent, or, being present, would dissent. The legislative power is only in the king, and the estates of parliament only consent: and in parliament the king has a negative voice, whereby he may not only hinder any act to pass, but even any overtures to be first debated there. The acts of parliament must be proclaimed upon forty days, that the lieges may know them; and till these forty days elapse, they are not binding*.

4. To secure the crown against factions, and impertinent overtures in open parliament, our parliaments chuse, before they proceed to any business, eight out of each state, who, with the officers of state, determine what laws or overtures are to be brought in to the parliament; and they are therefore called the lords of articles; and are chosen in manner following; * first, the whole bishops go by themselves, and the nobility by themselves,

* Parl.
1581.
c. 129.

Lords of
the ar-
ticles.

* Parl.
1663.
c. 1.

and the clergy make choice of eight noblemen, and the noblemen make choice of eight bishops; and then both clergy and nobility meet together, and make choice of eight barons and eight burgesses, which election being reported to the parliament, it is by them approven; the officers of state being still supernumerary.

Conven-
tion of
estates,

5. We have another meeting of the three estates, called the convention of estates, which is now indicted on twenty days, and proceeds in the same way that the parliament does; differing only from it, in that the parliament can both impose taxations and make laws; whereas the convention of estates can only impose, or rather offer, taxations, and make statutes for uplifting those particular taxations; but can make no laws. And, of old, I find by the registers of the conventions, (the eldest whereof now extant is in *anno* 1583) that the convention of estates consisted of any number of the three estates, called off the streets summarily by the king: and yet they cried down

down or up money, and judged processes, which now they do not.

6. The privy-council is constituted by a special commission from the king, and regularly their power extends to matters of public government; in order to which they punish all riots (for so we call breach of peace); they sequestrate pupils, give aliments to them, and to wives who are severely used by their husbands; and many such things, which require so summary procedure, as cannot admit of the delays necessary before other courts: and yet, if any of these dip upon matters of law, (for they are only judges *in facto*) they remit the cognition of it to the session, and stop till they hear their report. The council also may delay criminal executions, and sometimes change one punishment into another, but they cannot remit capital punishments: they may also adjourn the session, or any other court. It has its own president, who presides in the chancellor's absence, and its own signet and seal. All who are cited to compare there must be personally present, be-

Privy
council.

cause, ordinarily, the pursuer concludes, that they ought to be personally punished. All diets are peremptor; all debate is in writ, no advocate being ordinarily allowed to plead before them, because the council only judges in matters of fact.

The
lords of
council
and ses-
sion.

* Parl.

1457.

c. 61. 62.

63.

† Parl.

1537.

c. 36. 37.

38. 39.

40.

7. The lords of council and session are judges in all matters of civil rights: of old they were chosen by the parliament, and were a committee of parliament*; but the present model was fixed and established by king James V. after the model of the parliament of Paris †.

8. Of old it consisted of seven ecclesiastics, and seven laics, and the president was a churchman; but now all the fifteen are laics; and there sits with them four noblemen, who are called extraordinary lords, and were allowed to sit to learn, rather than decide; but now they vote, as well as the ordinary lords. All the lords are admitted by the king, and, by statute, cannot be admitted till they be twenty-five years of age ‡, and except they have 1000 merks, or twenty chal-
ders

‡ Parl.

1592.

c. 132.

ders of victual, in yearly rent. Nine are a quorum.

9. Crimes of old were judged by the justice-general, justice-clerk, and two justice-deputes; but now five lords of session are joined to the justice-general and justice-clerk, and they are called the commissioners of justiciary, because they sit by a special commission: four of which number make a quorum in time of session, three in time of vacance, and two at circuit-courts *.

Criminal judges.

* Parl. 1672. c. 16.

10. The exchequer is the king's chamberlain court †, wherein he judges what concerns his own revenues: it consists of the treasurer, (in whose place are sometimes named commissioners of the treasury) the treasurer-depute, and as many of the lords of exchequer as his majesty pleases.

Exchequer.

† Parl. 1633. c. 18.

11. The high admiral has a commission from the king, to judge in all maritime affairs, not only in civil, but also in criminal cases, where the crime is committed at sea, or within flood-mark: nor can the lords of session advocate causes from

High admiral.

• Parl.

1681.

c. 16.

from him*; tho' they can reduce his decreets, as he does the decreets of all inferior admirals, or admiral-deputes.

TITLE IV.

Of inferior jurisdictions and courts.

1. **N**O judicature whatsoever can sit in time of parliament, without a dispensation from the parliament; and no inferior court can sit in time of vantage, without a dispensation from the lords of session; but after Michaelmas head court, the restriction ends; and they may at any time proceed to cognosce crimes, without dispensation, for *interest reipublicæ* that crimes be punished without delay.

Sheriff.

† Parl.

1592.

c. 126.

2. The sheriff is the king's chief and antient officer for preserving the peace, and putting the laws in execution†: he has both a civil and criminal jurisdiction, and his commission is under the great seal: he is obliged to raise the hue and cry after all rebels, and to apprehend them,

them, when required; to assist such as are violently dispossessed; to apprehend such as say mass *, or trouble the peace, and take caution for their appearance: he is judge in all crimes, except treason, and the four pleas of the crown, to wit, murder, fire-raising, robbery and ravishing of women †: but murder he can only judge if the murderer was taken with red hand, that is to say, immediately committing the murder; in which case he must proceed against him within three suns: and in theft he may judge, if the thief was taken with the fang.

3. The sheriff is also judge competent to punish bloodwits, for which he may fine in 50 pounds Scots, but no higher regularly, except the riot be atrocious, or aggravated by the circumstances of the time and place, when and where it was committed, or of the persons upon whom it was committed. He may likewise for contumacy fine in 50 pounds Scots.

4. Royal burroughs are not sheriffs within themselves, except the king grant them the privilege by a special concession:

* Parl.
1661.
c. 8.

† Leg.
Mak. 2.
Act. 11.
Quon.
attach.
cap. 79.

sion: and, even when they are erected sheriffs within themselves, they are not exeemed from the sheriff's jurisdiction, within whose bounds the burgh doth ly; but they have only a cumulative power with them, so that there is *locus præventioni*, and the first attacher will be preferred. But if their erection contain a power of repledging from the sheriff, then they have the same power that is competent to a lord of regality.

Lords of
regality.

5. A lord of regality is he who has the land whereof he is proprietor or superior, erected with a jurisdiction equal to the justices in criminal cases, and to the sheriff in civil causes; he has also right to all the moveables of delinquents and rebels, who dwell within his own jurisdiction, whether these moveables be within the regality or without the same: and, because he has so great power, therefore no regality can legally be granted except in parliament*.

* Parl.
1455.
c. 43.
Repledg-
iation.

6. The lord of regality has also by his erection power to repledge from the sheriff, and even from the justices, in all cases,
except

* except treason, and the pleas of the crown; that is to say, to appear and crave, that any dwelling within his jurisdiction may be sent back to be judged by him: and he is obliged to find caution that he shall do justice upon the malefactor whom he repledges, within year and day: and the caution is called Culreach †.

• Parl.
1587.
c. 29.

† Quo-
niam
attach.
cap. 8.

Steward.

7. The steward is the king's sheriff within the king's own proper lands, having as much power and privilege as a regality: and these were erected where the lands having been erected before in earldoms or lordships, fell in the king's hand by forfeiture or otherwise. For else, the king appointed only a baillie in them; and these jurisdictions are called bailliaries, the baillies of the king's proper lands having the same power with the sheriff. And all these, viz. the sheriff, the steward, and the lord of regality, proceed in their courts after the same way, and each of them has a head-burgh where they hold their courts, and where all letters must be executed and registrated.

Baillie.

8. The

Prince of
Scotland.

8. The prince of Scotland has also an appanage or patrimony, which is erected in a jurisdiction, called the principality. The revenues come in to the exchequer, when there is no prince; but when there is one, he has his own chamberlain.

Justices
of peace.

9. Justices of peace are these who are appointed by the king or privy-council, to advert to the keeping of the peace; and they are judges to petty riots, servants fees, and many such like, relating to good neighbourhood, expressed in the instructions given them by the parliament *, and are named by the council, albeit, by the foresaid statute, the nomination is to be by his majesty and his royal successors, which the king has now remitted to the privy-council.

* Parl.
1661.
c. 38.

Consta-
bles.

10. The justices of peace do name constables within their own bounds, from six months to six months: their office is to wait upon the justices, and receive injunctions from them; delate such riots and crimes to the justices as fall under their cognizance; apprehend all suspect persons, vagabonds, and night-walkers,

as

as is at length contained in their injunctions given them by the foresaid act.

11. Every heretor may hold courts for causing his tenants pay his rent: and, if he be infest *cum curiis*, he may decide betwixt tenant and tenant in small debts, and may judge such as commit blood on his own ground, though his land be not erected in a barony: but if his land be erected in a barony, (which the king can only do) he may, like the sheriff, unlaw for blood-wits in L. 50. and for absence in L. 10. And if he have power of pit and gallows, he has as ample a criminal jurisdiction as the sheriff; though with this difference, that the sheriff can judge a thief upon citation, whereas the baron can only judge him if he apprehend him within the barony: and if the sheriff have first cited or attached the malefactor, he excludes the baron's jurisdiction by that prevention.

Baron
courts.

C TITLE

TITLE V.

Of ecclesiastic persons.

* Parl.

1567.

c. 2.

† Parl.

1584.

c. 7.

‡ Parl.

1584.

c. 131.

Parl.

1661.

c. 4.

Parl.

1663.

c. 5.

Archbi-
shop and
bishops.

1. **SINCE** the reformation, the king is come by our law in place of the pope*; and all rights to kirklands must be confirmed by him, else they are null †. His majesty only can call convocations of the clergy, (for so we call our national assemblies. ‡) and his commissioner sits in them, and has a negative.

2. We have two archbishops, and twelve bishops: and they are thus elected; the king sends to the chapter a *conge d' elire*, (which is a French word signifying a power to elect) and with it a letter recommending a person therein named; and the chapter returns their election: whereupon the king grants a patent to the elected, giving a right to the revenue during life, and a mandate to the archbishop or bishops to consecrate him; both which pass the great seal*.

* Parl.

1617.

c. 1.

3. The archbishops and bishops have
the

the sole power of calling synods; which is a provincial assembly of all the clergy within one diocess †; and in these they name the brethren of the conference, who are like the lords of articles in the parliament; and by their advice the bishops depose, suspend and manage.

Synods.

† Parl.
1612.
c. 1.

4. Bishops have their chapters, without whose consent, or the major part, the bishop cannot alienate, nor dilapidate any part of their patrimony*; which major part must sign the deeds done by the bishops; and it is sufficient if those of the chapter sign at any time, even after the bishop, but it must be in his lifetime: nor are minors or absents counted; and one having two benefices has two votes: but the appending of the seal is, by special statute, declared to be sufficient in deeds done by the archbishop of St Andrews, without the subscriptions of the chapter †.

Chapters.

* Parl.
1606.
c. 3.

† Parl.
1607.
c. 8.

5. A parson, or *rector ecclesiæ*, is he who is presented to the tithes *jure proprio*: but, because of old parsonages were bestowed on monastries, therefore they sent vicars, so called because they served

Vicars.

the cure for them, and who got a share of the stipend, for their pains; either *ad placitum*, and they were called simple vicars; or for life, and they were called perpetual vicars: and after the reformation, the churches which so belonged to them continued vicarages still, the titular, who came in the place of the convent, retaining the right to the parsonage duties.

Collegiate
kirks.

6. There were in the time of popery collegiate kirks built and doted by kings and great men, for singing of mass, which were governed by a provost, and some for singing, who were called prebends: and, because some parishes were wide, some were allowed to build a chapel for their private devotion; and, since the reformation, these chaplainries and prebendaries are allowed to be bestowed by the patrons upon burfars in colleges, notwithstanding of the foundations*.

Chaplainries.

* Parl.
1567.
c. 12.

7. For understanding all these, it is fit to know, that the primitive church, either to invite men to build or dote, or to reward such as had, did allow such as either had

had built, or had bestowed the ground whereon to build, or had doted a church already built, to present alone, if they were the only benefactors, or by turns, if they were more; and they were called patrons, or *advocati ecclesiarum*, according to that,

Patronum faciunt dos, ædificatio, fundus.

8. When a church vaiks, the patron must present within six months a fit person to the bishop, else the right of presentation falls to the bishop, *jure devolutio* * : but if the bishop refuse to admit and collate the person presented, the patron must complain to the archbishop; and if he also refuse or delay, the privy council will grant letters of horning against the bishop, to receive the person presented †; and, during the vacancy, upon that refusal, the patron may retain the vacant stipends.

Patron.

* Parl.

1567.

c. 7.

† Parl.

1612.

c. 1.

9. Upon this presentation, the bishop causes serve an edict on nine days, wherein all persons are, after divine service, advertised to object why such a man should

Collation
and insti-
tution.

not be admitted to the benefice ; and, if none object, the bishop confers the church and benefice upon the person presented ; and this is called a collation : after which the bishop causes enter him who is so collated, by causing give him the bible and the keys of the church, and this is called institution. Presentation gives only *jus ad rem*, and institution *jus in re*, and is as a *fasine*.

Mensal
churches.

10. If the bishop be patron himself, he confers *pleno jure*, and the presentation and collation are the same : bishops also have mensal churches, so called because they are *de mensa episcopi*, being a part of his patrimony, in which he serves by his vicars, and plants as diocesan bishop : and if a town or parish resolve to make a second minister, when they are not patrons, he is called a stipendiary minister, (as are all ministers who are presented to modified stipends) and he is collated and instituted also : but the patron's presentation is sufficient in prebendaries, and other benefices which have not *curam animarum*, and that without the necessity
of

of collation or institution; the bishop having no other interest in the benefices, but in so far as they concern the cure of souls.

11. By act of parliament, all ministers must have a competent stipend, not below eight chalder of victual, or 800 merks; or above 1000 merks, or ten chalder of victual (except there be just reason to give less); * together with a manse and glebe. But the commissioners for plantation of kirks are not now precisely tyed to these proportions, but may modify either more or less, according as they see cause.

Ministers
stipends.

* Parl.
1617.
c. 3.
Parl.
1633.
c. 8.

12. The manse (*a manendo*) is the place where the minister is to dwell; the glebe, from *gleba terræ*, is a piece of land for corn and fodder to his beasts. If there was a manse of old, belonging to the parson or vicar, the minister has right to it; if there was none, the parishioners must build one, not exceeding L. 1000. and not beneath 500 merks ‡, at the sight of the bishop of the diocess, or such ministers as he shall appoint, with two or three of the most discreet men in the parish:

Manse.

‡ Parl.
1663.
c. 21.

* Parl.
1612.
c. 8.
Glebe.

Parl.
† 1572.
c. 48.
† Parl.
1593.
c. 163.

rish : as also the heretors are liable to repair the manse ; but the present incumbent is obliged to leave it in as good condition as they gave it to him *.

13. The minister's glebe is to comprehend four acres of arable land, or sixteen fowms grass, where there is no arable land, which is to be designed out of the lands which belonged of old to abbots, priors, bishops, friars, or any other kirklands within the parish † ; with freedom of foggage, pasturage for a horse and two cows, feuel, feat and divot † : which glebes are to be designed by ministers named by the bishop, with the advice of two of the most honest and godly of the parishioners ; and the designation is to be signed by the designers.

14. If a bishop or minister be consecrated, translated or entered to his benefice before Whitsunday, he has right to the whole year's fruits, because they are then presumed to be fully sown ; and if he be deposed or transported before Whitsunday, for that same reason he hath no part of that year : but if he serve the
cure

cure after Whitsunday, and be transported or depofed before Michaelmas, he hath the half of that year's ſtipend; and if he ſerve till after Michaelmas, he hath the whole. So that the legal terms of benefices are Whitsunday, at which time the ſowing is ended; and Michaelmas, at which time the fruits are reaped.

15. The relict, bairns or neareſt of kin, have likewiſe right to the annate after their death, which was introduced by the Canon Law; and, by a ſpecial ſtatute with us, is declared to be half a year's rent of the benefice or ſtipend, over and above what is due to the deſunct for his incumbency ‡: ſo that if he ſurvive Whitsunday, they have the half of that year for his incumbency, and the other half as annate; and if he ſurvive Michaelmas, they have the half of the next year for his annate.

‡ Parl.
1672.
c. 31.

16. The annate is equally divided betwixt the relict and the children; and if the deſunct have neither, it belongs to the neareſt of kin. It needs no confirmation; for it never belonged to the deſunct, being

being a mere gratuity bestowed by the law for entertaining these, because it is presumed ministers have not much to leave them: and, for the same reason, it is not affectable by the defunct's creditors; nor can it be disposed upon by himself to strangers, either in his testament or by assignation.

High
commis-
sion.

17. There is a committee of parliament always sitting, called the commission for plantation of kirks and valuation of tiends, (consisting of a select number of so many of every estate of parliament) who have power to modify and augment ministers stipends, and to unite and disjoin churches, &c. whose decreets, because they are a committee of parliament, cannot be reduced by the session, or any other inferior judicature.

Commit-
tee of
parlia-
ment.

18. The primitive Christians remitted the cognition of all cases that related to religion, as the matters of divorce, bastardy, the protection of dying mens estates, to their bishops, or such as they employed under them, who were called officials, and with us are called commissars;

commissars; and are called therefore *judices Christianitatis*: and they are therefore the only judges in divorce, because it is the breach of a vow; and to scandal, because it is an offence against Christianity; and of all matters referred to oath, (if the same exceed not L. 40. Scots) because that power is contained in their instructions, and that an oath is a religious ty.

19. Every bishop has his commissar, who has his commission from the bishop only; and this extends no further than the constituent's diocess: but the archbishop of St Andrews has power to name four commissars, who are called the commissars of Edinburgh, because they sit there; and they only are judges to divorce upon adultery, and can only declare marriages null for impotency, and to bastardy, when it has any connexion with adultery or marriage; and they only may reduce the sentences of all inferior commissars*; though the lords of session may reduce even their decreets and sentences. They have instructions from the king,

Commissars.

Commissars of Edinburgh.

• Parl.
1609.
c. 6.

king, which are their rule : and these are likewise recorded in the books of record of session.

TITLE VI.

OF MARRIAGE.

Having spoken fully of persons, as they are considered in a legal sense ; we shall now treat of marriage, which is the chief thing that concerns persons and their state in law.

Marriage.

1. **M**arriage is defined to be the conjunction of man and wife, vowing to live inseparably together, till death.

2. By conjunction here, consent is understood ; *nam consensus, non coitus, facit matrimonium* :

Sponsalia.

3. Consent is either *de futuro* or *de presenti*. Consent *de futuro* is a promise to solemnize the marriage, which in law is called *sponsalia* : and this is not marriage ; for either party may refile, *rebus integris*, notwithstanding of the intervening promise or espousals. Consent

de

de presenti is that in which marriage does consist; and therefore it necessarily follows, that none can marry except those who are capable to consent: and so ideots, and furious persons, *durante furore*, cannot marry; nor infants, who have not attained the use of reason, that is, when they are within the years of pupilarity, which is defined in law to be fourteen years in males, and twelve in females, *nisi malitia suppleat aetatem*.

4. The law, in decency, requires the consent of parents; though a marriage without it is valid, if the persons married be capable of consenting.

5. By our law none can marry who are nearer relations than cousin-germans; which is suitable to the Judicial Law of Moses*; and the same degrees prohibited in consanguinity are also forbidden in affinity.

6. Marriage is either regular and solemn, or clandestine. The regular way of marrying is by having their names proclaimed in the church three several times, which we call proclamation of banns, without which, or a dispensation from the

D

bishop,

* Levit.
ch. xviii.
Parl.
1567.
c. 15.

Division
of mar-
riage.

• Parl.
1672.
c. 9.
† Parl.
1661.
c. 34.
‡ Parl.
1593.
c. 77.

bishop, the marriage is called a clandestine marriage, and the parties are fineable for it, and both lose their *jus mariti* * and *jus relicte*; but the marriage is still valid †. Cohabitation also, or dwelling together, is presumed to be marriage ‡, if the parties were reputed man and wife during their lifetime; and so the children are not bastards, tho' they cannot prove that their parents were married, unless it be clearly proved that they were not married.

Communion of
goods.

7. From the conjugal society arises the communion of moveable goods betwixt man and wife; but the administration thereof, during the marriage, is solely in the husband; which reaches even to alienation, and disposing upon the moveables at his pleasure, though they be not disposed to him by her (marriage being a legal assignation as to this effect): but he has no further right to her heretage, save that he has right to the rents of it, and to administer and manage it during the marriage; and this is called *jus mariti*; and is so inseparable from the quality

Jus mariti.

lity of a husband, that he cannot, by our law, renounce his power of administration; so that they are both *domini* by this communion: but the husband has, during the marriage, the administration and disposal of the goods in the communion. But a stranger may effectually convey an estate to a wife, so as that it will never be subject to the husband's administration.

8. The husband is liable, during the marriage, to pay her moveable debts; but how soon the marriage is dissolved, he is no further liable to pay her debts than in as far as he was a gainer by her estate, or that there was such diligences done against him during the marriage that affect his estate either heretable or moveable.

9. If the wife contract any debt, or do any other deed, after the proclamation of banns, the husband will not be thereby prejudged.

10. The husband is also obliged to aliment his wife; and if he refuse, the privy council, or lords of session, will modify

fy an aliment to her out of her husband's means, suitable to his quality; which they will also grant *ob sævitiam*, if he treat her inhumanly.

11. The husband is tutor and curator to his wife; and therefore, if she had tutors or curators formerly, their power is devolved over by the law upon the husband; and whatever deeds she does without his consent are null, whether she be major or minor; and when she is cited, he must be cited for his interest: and if she marry during the dependence of a process, the husband must be called by letters of supplement.

12. Because the sole administration, during the marriage, belongs to the husband, law hath secured the wife, that she cannot oblige herself, when she is clothed with a husband, albeit with his consent: and therefore all bonds and obligations granted by a wife *stante matrimonio*, are *ipso jure* null: but if she oblige herself *ad factum præstandum*, she will be liable, as if she should oblige herself to infect any man in lands properly belonging to herself.

13. During the marriage, all donations made betwixt husband and wife are revocable at any time in their life, (except in so far as they are suitable provisions) lest otherwise they might ruin themselves through love, fear or importunity; and that either expressly, by revoking what is done, (though they obliged themselves not to revoke) or tacitely, by disposing to others what was so gifted.

*Donatio
inter vi-
rum &
uxorem.*

14. All rights made by a wife to her husband, or any third party, with his consent and to his behoof, are valid rights, if they be ratified by her before a judge, before whom she is to declare, without the presence of her husband, that she was not compelled to do that deed; and swear, that she shall never quarrel the same; whereas, if they be not ratified, they may be quarrelled, as extorted *vi & metu*; or may be revoked, as *donatio inter virum & uxorem*; which the ratification before any judge does absolutely exclude, *propter religionem sacramenti*; the ratification being *extra presentiam mariti*, though she was forced.

Dissolu-
tion of
marriage.

15. Marriage is dissolved either by death or divorce: and if the dissolution of the marriage be by death, there is a difference, if the same be within year and day of the marriage, or thereafter; for if either the husband or the wife die within the year, all things done *intuitu matrimonii* become void, and return to the same condition they were in before the marriage, except there be a living child procreate of the marriage, who was heard cry.

16. If the marriage be dissolved by death after the year expires, then the wife surviving has right to a third of the moveable estate, if there be children; and to the half, if there be none: and this is called *jus relictæ*: and though this right does not hinder the husband to give or dispose upon his moveables in his life, yet he cannot do any deed to defraud his wife of this right, the fraud being palpable. She has also a right to a liferent of the third of the lands wherein he died inest; and this is called a widow's terce; and to any other provisions contained in her contract of marriage: and if she be provided

Jus re-
lictæ.

Terce.

vided to any particular provision, she is excluded from a terce *, *nam in hoc casu provisio hominis tollit provisionem legis*, unless her terce be expressly reserved. A wife has right to her *paraphernalia*, exclusive both of the husband's *dominium* and administration; by which is meant her wearing-clothes and jewels; and the husband surviving has right to the tocher: and if he marry an heretrix, he has right to all her lands, after her death, during his own life, if there be a child of the marriage who was heard cry; and this is called the courtesy of Scotland †.

18. Marriage may be either declared to have been null *ab initio*, for impotency, contingency of blood, or that either party stands married; or else it may be dissolved for adultery; the cognition of all which belongs to the commissars of Edinburgh privatively; or for willful desertion, to be pursued by an action for non-adherence, either before the commissars of Edinburgh, or any inferior commissar, to whose jurisdiction the parties are liable, after malicious diverting for four years,

* Parl.
1681.
c. 10.

Paraphernalia.

Courtesy
of Scot-
land.

† R. M.
lib. 2.
c. 58.
L. B.
cap. 44.

Parl.
1573.
c. 55.

years, they being thereupon (after due admonition to adhere, and citation for that effect) excommunicated; which sentence being pronounced is a sufficient cause of divorce*; in which cases the pursuer must give his oath that the process is not carried on by collusion: and, after a decret of divorce is obtained, in either case the party innocent may marry; but the party that is guilty cannot; and besides loses all the benefit that they could expect by the marriage.

T I T L E VII.

Of minors, and their tutors and curators.

1. **W**Hilst persons are within twenty one years, the law presumes them to want that firmness of judgment which is requisite for the exact management of their affairs; and during that time they are called minors, by a general term; though properly such only are called minors who are past pupilarity, which

Minors, 1

which lasts in males till fourteen, and in females till twelve.

2. Tutorship may be defined, *A power and faculty to govern the estates and persons of pupils*; and the law gives tutors and curators for the management of their affairs.

Defini-
tion of
tutorship.

3. There are three kinds of tutors, viz. tutor nominate, tutor of law, and tutor dative. Tutor nominate (who is likewise called tutor testamentary) is he who is left tutor by the father in his testaments, or any other writ; and he is not obliged to find caution, or give his oath *de fidei administratione*, because it is presumed the parent hath chosen a sufficient person.

Division
of tutors.

Tutor
testa-
mentary.

4. The father only can name tutors; but if the mother, or even a stranger, give or dispose any thing to a child, they may name a tutor to manage what they give; but if there be no tutor nominate, or if he accepts not, then there is place for a tutor of law, who is so called because he succeeds by law: and, generally, the nearest agnate, (for so we call such as

are

Tutor of
law.

* Parl.
1474.
c. 51.

Tutor-
dative.

are related by the father) who is to succeed to the minor, being past twenty-five years, and would be heir to him, is his tutor in law *. He takes a brieve out of the chancellary, and serves himself before any judge, to whom it is directed; and the tutor of law must find caution before he administrate.

5. If he do not serve within a year after the time he might have served, then any person may give in a signature to the exchequer, and he gets a gift under the privy seal of being tutor-dative, and finds caution, acted in the books of exchequer: but of old they found caution in the commissar's books. This tutor, and he only, is obliged to make faith *de fidei administratione*.

6. If there be more tutors than one, the major part must all consent; but the pupil needs not subscribe with his tutors, though a minor must subscribe with his curators: but if there be a tutor *sine quo non*, he must always be one of the managers and consenters.

7. After the years of pupilarity, there must

must be a summons raised at the pupil's instance, summoning some of the father's side, and some of the mother's side, upon nine days warning, to appear before any judge: and at the day, the minor gives in a list of those he intends to chuse to be his curators, and those who accept must subscribe the acceptation, and they must find caution *de fidei**: upon all which the clerk extracts an act, which is called an act of curatory. There uses to be sometimes curators *sine quibus non*; and the major part with these are still a quorum, except the minor in his particular election hath appointed otherwise; for the quorum is in the minor's power, and the act bears how many shall be a quorum.

Curators.

• Parl.
1555.
c. 35.

8. There are these differences betwixt tutors and curators, that *tutor datur personæ, curator rei*; a tutor acts and subscribes for his pupil, a curator with him; but both must make inventory of all the pupil's estate before they administrate, with consent of the nearest of kin on both sides; and if they neglect to make inventory,

Difference betwixt tutors and curators.

* Parl.
1672.
c. 2.

tary, they will get no expences allowed them during their administration, and may be removed from their offices as suspect *, neither have salaries: and both are liable to compt, but not till their offices expire; as both have action against their minors for what they profitably expended during their administration, which is called *actio tutelæ contraria*.

9. If the minor have curators, and do any thing, without their consent, to his prejudice, (for he may make his condition better without them, but not worse, the advantage being evident and without hazard) then that act is *ipso jure* null, that is to say he need not revoke: but if he have no curators, then any act he does to his own prejudice is valid: but he must reduce the same thus, *viz.* he must write a revocation, and subscribe it before two witnesses, and registrate it; and thereupon he must raise and execute a summons of reduction of that act, *ex capite minoritatis & læsionis*, before he be twenty five years of age; wherein he must make appear he was both minor and was
læsed

lesed, otherwise the lords will not repone him. Though this revocation be not absolutely necessary, yet the executing of a summons before 25 is absolutely necessary: and though a minor swear not to revoke, yet this oath is declared null by law, and the eliciter of it punishable and infamous*: but if he fraudulently circumveen another, by saying he was major, he will not be restored against his own fraud.

* Parl.
1681.
c. 19.

10. A tutor or curator cannot pursue his pupil till he has compted for his intromissions; for it is presumed he has his pupil's estate in his own hands; and whatever right he buys of what belonged to his pupil, is presumed to be bought with his pupil's means, and so the advantage must accresce to the pupil.

11. So careful has our law been to protect minors, and to secure old estates, that *minor non tenetur placitare super hereditate paterna* †; that is to say, a minor is not obliged to answer any process that may evict his father's heritage: but yet, if his father's right be quarrelled for his

† Stat.
Wil.
c. 39.

E

father's

father's crimes or delicts, as in the cases of falshood, forfeiture or recognition, these cases are excepted, and he is obliged to answer. *2do*, This privilege extends not to actions concerning marches, or division of lands. *3tio*, It defends not against the superior, pursuing for his casualities. *4to*, Where the minor's right is only quarrelled consequentially, the chief right quarrelled belonging to a major, there is no place for this privilege. *5to*, It defends not in cases where the heritage was derived from collaterals, such as brothers or uncles. *6to*, It defends only, where the heritage descended even from the father or grandfather, if they died in peaceable possession, and if no process was intended against them in their own life-time. *7mo*, It takes only place where the father was actually infest; but then it is accounted heritage, though it was conquest by the father.

12. The privilege of minority is in some cases allowed to the minor's heir; which are comprised in these following rules: 1. If a minor succeeds to a minor, the

the time of restitution is regulated by his own minority, and not by his predecessor's. 2. If the predecessor be major, and *intra quadriennium utile*, restitution is competent during the heir's minority; but he has no further of the *anni utiles* than remained to the defunct at the time of his decease. 3. If a major succeed to a minor, he has only *quadriennium utile* after the minor's decease, or so much thereof as was unexpired at that time. But this privilege of minority, as to the expiring of the legal of appraisings, is special and singular. *Vide infra*, title *Comprif. and adjud.*

13. Minority ends in both men and women when they are twenty one years of age compleat; but after that, there are four years granted wherein they may reduce what they did to their lesion and prejudice during their minority; and these years are called *anni utiles*, or *quadriennium utile*.

14. If a man be an idiot or furious, he must be found to be so by an inquest; and thereafter his nearest of kin may serve

Idiotry
or furio-
sity,

themselves tutors, or the exchequer may grant a tutor-dative, if they serve not; but the tutor in law will be preferred to that tutor-dative, offering to serve *quandocunque*: and it must be proved to the inquest at the time of the service, that he is furious, and when he began to be so; and all deeds done by him after that are null, not only from the date of the service, but from the time he was found to be idiot or furious *.

* Parl.
1475.
c. 66.

Prodigals
and their
interdic-
tion.

15. If a person be prodigal or spendthrift, he interdicts himself, either voluntarily, which is done by a bond, whereby he obliges himself to do nothing without the consent of such friends as he therein condescends upon, and these are therefore called the interdictors: and if this narrative be false, so that the person is not improvident, as he relates in the bond, this voluntary interdiction will be reduced. 2^{do}, Interdiction proceeds upon a pursuit at the instance of the nearest of kin against the prodigal, whom the lords will interdict if they see cause. Or, 3^{tho}, Though there be no pursuit, yet if,

if, in another process, they find he has been often, or is obnoxious to be cheated, they will interdict him *ex proprio motu*, and these two last are called judicial interdictions; and no interdiction lasts longer than the levity and prodigality which occasioned it; but this requires also the sentence of a judge.

16. Upon this voluntary bond, the lords of session grant letters of publication; and after these letters are published at the market cross of the head burgh of the shire where the person interdicted dwells, and are registrated, the person interdicted can do nothing to the prejudice of his heritable estate, otherwise the interdictors may reduce these deeds, as done after the publication of the interdiction (for interdictions extend only to heritage); but yet the person himself is still liable to personal execution, even upon these deeds done after interdiction.

Letters
of publi-
cation.

17. A father is likewise, in law, administrator to his own children; that is to say, is both tutor and curator to them, if they fall to any estate during their minority:

Admini-
strator in
law.

rity: and if either pupil or minor have any legal action to prosecute, and want tutors or curators, the lords, or any other judge before whom the process is depending, will, upon a bill, authorise curators, who are therefore called curators *ad lites*.

18. Tutors and curators are not proprietors, but administrators; therefore they can only manage rationally, and do every thing for the utility of the pupil; but even this administration does not empower them to sell lands, or to renounce any heritable right belonging to the pupil, except for paying of debt, in which case they must have a decret for their warrant; nor does it empower them to set tacks for longer time than their office lasts; nor can any tutor be *auctor in rem suam*, by authorising the pupil to do any deed for his own advantage, such as to become principal or cautioner for him to a third party.

Dili-
gence of
admini-
strators.
Pro-tu-
tors.

19. All these tutors, curators and administrators, or any who behave as such, and who are called in our law pro-tutors, are liable to do exact diligence; and therefore,

fore, if any of their pupil's debtors become bankrupt, or their tenants break, they are liable *in solidum*, so that the pupil may pursue any one of the tutors for the negligence of all the rest; but he has his relief against the rest.

20. They are likewise liable to put the minor's rents out upon annualrent within half a year, or a term, after they receive them, and to put out his money upon annualrent within a year, both which times are allowed to get good debtors: but if his bonds bear annualrent, they are only obliged to take in these annualrents once during their office, and to turn them into a principal sum, bearing annualrent.

21. After tutors and curators have once accepted they cannot renounce; but if they miscarry or malverse in their administration, they may be removed by an action, as suspect tutors.

22. If there be more tutors or curators, the office, upon the death of any of them, accretes to the survivors, except they be named jointly, for then the first nomination is dissolved by the death of any one
of

of them, the defunct not having trusted any one. And, for the same reason, if a certain number be declared a quorum, the nomination falls, if so many die as that this number survives not; nor does the office accresce to such as survive.

Slavery,
and *pa-*
tria potes-
tas.

23. We have little use in Scotland, of what the institutions of the Roman law teach concerning slavery, or *patria potestas*; for we, as Christians, allow no men to be made slaves, that being contrary to the Christian liberty: and the fatherly power, or *patria potestas*, has little effect with us; for a child in family with his father acquires to himself, and not to his father, as in the Civil Law.

THE

THE
INSTITUTIONS
OF THE
LAW of SCOTLAND.

BOOK SECOND.

TITLE I.
*Of the division of rights, and the several
ways by which a right may be acquired.*

1. **B**EING to treat in the second book of things themselves to which we have right, and how we come to have right to them, it is fit to know,

2. That *dominium*, or property, is the power of using and disposing what is ours, except in so far as we are restricted by law or paction: and the law, designing the general good, allows us not to use our own so as thereby chiefly to prejudge our neighbour; *et in æmulationem vicini.*

The

Divi-
sion of
things.

3. The property of every thing belongs to some person or society, and cannot float in an uncertainty; *nam. dominium non potest esse in pendent.*

4. Some things do not fall under commerce, and so we cannot acquire any property in them, such as things common, as the ocean (though our king has right to our narrow seas, and to all the shores).
2^{do}, Things public, which are common only to a nation or people, as rivers, harbours, and the right of fishing in the said rivers. 3^{tio}, *Res universitatis*, which are common only to a corporation or city, as a theatre, or the market place, and the like. 4^{to}, Things that are said to be no man's, but are *juris divini*, which are either sacred, such as the bells of churches; for though we have no consecration of things since the reformation, yet some things have a relative holiness and sanctity, and so fall not under commerce, that is to say, cannot be bought and sold by private persons. 5^{to}, Things that are called *sanctæ*; so called because they are guarded from the injuries

ries of men by special sanctions, as the walls of cities, persons of ambassadors, and laws. *6to*, Things religious, such as church-yards.

5. As to those things which fall within commerce, we may acquire right to them either by the law of nature and nations, or by our civil and municipal law. Dominion or property is acquired by the law of nations, either by our own fact and deed; or, *2do*, By a connexion with, or dependence upon things belonging to us: the first, by a general term, is called occupation, and the last accession.

Ways of
acquiring
property.

6. Occupation is the appropriating and apprehending of those things which formerly belonged to none. And thus we acquire property in wild beasts, of which we acquire right how soon we apprehend them, or are in the prosecution of them, with probability to apprehend them; as also, we retain a right to them whilst they remain in our possession, and even after they have escaped, if they be yet recoverable by us. *2do*, Property comes by accession; as for instance a house

Occupation.

built

Accession.

built upon, or trees taking root in our ground, and the product also of our beasts belong to us; and ground that grows to our ground insensibly, becomes ours, and is called *alluvio* by the Civilians. And it is a general rule in law, that *accessorium sequitur naturam sui principalis*: and yet a picture drawn by a great master upon another man's sheet or table, belongs to the painter, and not to the master of that whereon it was drawn, the meanness of the one ceding to the excellency of the other.

Specifi-
cation.

7. There are many other ways of acquiring right and property, which may be referred either to occupation or accession; as, if a man should make a ship of my wood, it would become the maker's, and would not belong to me, to whom the wood belonged; and this is called specification; in which this is a general rule, that if the species can be reduced to the rude mass of matter, then the owner of the matter is also owner of the species, or thing made: as, if a cup be made of another man's silver, the cup belongs
not

not to the maker, but to the owner of the metal, because it can be reduced to the first mass of silver; but if it cannot be reduced, then the species will undoubtedly belong to him that made it, and not to the owner of the matter; as wine and oil made of another's grapes and olives, which belongs to the maker, seeing wine cannot be reduced to the grapes of which it was made.

8. Property is likewise acquired when two or more persons mix together in one, what formerly belonged to them severally; and if the materials mixed be liquid, it is called by a special name confusion, as when several persons wines are mixed and confounded together; but if the particulars mixed be dry and solid, so as to retain their different shapes and forms, it is called commixtion: and in both cases, if the confusion or commixtion be by consent of the owners, the body or thing resulting from it is common to them all; but if the commixtion be by chance, then, if the materials cannot be separated, the thing is yet common; as when the grain

Confu-
sion.

Com-
mixture.

F

or

or corns of two persons are mixed together by chance, here there must necessarily be a community, because the separation is impossible; but if two flocks of sheep, belonging to different persons, should by accident mix together, there would be no community, but every man would retain right to his own flock, seeing they can be distinctly known and separated; and these two ways of acquisition are by accession.

Tradition.

9. The last and most ordinary way of acquiring property is by tradition, which is defined, *A delivery of possession by the true owner, with a design to transfer the property to the receiver*: and this translation is made either by the real delivery of the thing itself, as of a horse, a cup, &c. or by a symbolic delivery, as is the delivery of a little earth and stone in place of the land itself; for where the thing cannot be truly delivered, the law allows some symbols or marks of tradition; and so far is tradition necessary to the acquiring of the property in such cases, that he who

who gets the last right with the first tradition, is still preferred by our law.

10. If he who was once proprietor does willingly quit his right, and throw it away, (which the Civil Law calls *pro derelicto habere*) the first finder acquires a new right *per inventionem*, or by finding it; by which way also men acquire right to treasures, and to jewels lying on the shore, and, generally, to all things that belonged formerly to no man, or were thrown away by them; but it is a general rule in our law, that what belongs to no man is understood to belong to the king.

*Acquisitio
per inven-
tionem.*

11. Prescription is a chief way of acquiring rights by the Civil Law; but because that title comprehends many things which cannot be here understood, I have treated of prescription amongst the ways of losing rights, it being upon divers considerations *modus acquirendi & amittendi*.

*Prescrip-
tion.*

12. We also acquire right to the fruits of those things which we possess *bona fide*, if these fruits were gathered in or uplified and consumed by us, whilst we

*Bona
fides.*

thought we had a good right to the thing itself; for though thereafter our right was found not to be good, yet the law judged it unreasonable to make us restore what we looked upon as our own, when we spent it; and therefore when this *bona fides* ceaseth, which may be several ways, especially by intenting an action at the true owner's instance, we become answerable for these fruits, though thereafter they be *percepti & consumpti* by us.

T I T L E II.

Of the difference betwixt heritable and moveable rights.

1. **H**AVING in the former title cleared how we acquire rights, we come now to the division of them.

Heritable
and
moveable
rights.

2. The most comprehensive division of rights amongst us is that whereby they are divided into heritable and moveable rights.

3. Heritable rights, in a strict sense, are only lands; and all sums of money, and other

other things which can be moved from one place to another, are moveable: but that is only counted heritable in a legal sense, which belongs to the heir, as all other things which fall to the executor are moveable; and so sums of money, albeit of their own nature they are moveable, yet, if they were lent for annualrent, they were of old reputed heritable.

4. For understanding whereof it is necessary to know, that albeit by the Canon Law all annualrents were forbidden, as being contrary to the nature of the thing, (money being barren of its own nature) yet the reformed churches do generally allow it; nor were the Jews prohibited to take annualrent from strangers.

Annual
rent.

5. Before the year 1641 all bonds and sums bearing annualrent were heritable as to all effects, so that the executor, who is *heres in mobilibus*, had no interest in, nor share of such bonds, but they belonged entirely to the heir: but that parliament finding that the rest of the children, beside the heir, had no provision by our law, except an equal share in the move-

Bonds -
heritable
and
move-
able.

* Parl.
1661.
c. 32.

Heritable
quoad fif-
sum &
relictam.

ables, they therefore ordained that all bonds for sums of money should be moveable, and so belong to the executors, except either the executors were seclused, or the debtor was expressly obliged to infect the creditor; which is likewise renewed since the king's restoration *: for in these cases it was clear, that by the destination of the defunct (which is the great test in this case) these sums were to be heritable. And yet all sums bearing annualrent are still heritable, in so far as concerns the fisk or the relict; so that, if a bond bear annualrent, to this day the fisk cannot claim any right to it, as falling under the rebel's single escheat (whereby when he becomes rebel all his moveables fall to the king); nor has the relict any right to a third of them, as she has to a third of other moveables, the law having presumed that relicts will be still sufficiently secured by their contracts. But whether the sum be heritable or moveable, all the bygone annualrents, and generally all bygones, are moveable as to all intents and purposes, and so fall to executors, and to the fisk, and

and to the relief; because bygone rests are looked on as money lying by the debtor, they being already payable, as all obligations bearing a tract of future time belong to the heir.

6. So far does the law defer to the will of the proprietor, in regulating whether a sum should be heritable or moveable, (the law thinking that every man is best judge how his estate should be bestowed) that if a man destinate a sum to be employed upon land or annualrent, this destination will make it heritable, and to belong to his heir: or though the sum was originally secured by a moveable bond, yet it may become heritable by the creditor's taking a supervening heritable security for it, or by comprising for his security. But yet the creditor's design is more to be considered than the supervenient right; as for instance, a sum may be moveable *ex sua natura*, and yet may be secured by an heritable security; as in the case of bygone annualrents, due upon investment of annualrent, which are unquestionably moveable of their own nature,

Sums heritable by destination.

ture, and yet they are heritably secured; and even executors may recover them by a real action of poinding of the ground: and if a wadsett bear a provision, that notwithstanding of requisition the wadsett shall still subsist, the requisition will make the sum moveable, though it continue secured by the infestment. As also, sums *ab initio* heritable may be secured by an accessory moveable security, without altering their nature; as for instance, if one take a gift of single escheat for securing himself in heritable sums, this does not alter the nature of the former heritable right.

7. Though a sum be heritable, yet if the creditor to whom it is due require his money either by a charge or requisition, it becomes moveable; for the law concludes in that case, that the creditor designs rather to have his money, than lying in the debtor's hands upon the former security; and if it were lying in money beside him, it would be moveable: and a requisition to one of the cautioners will make it moveable, as to the principal and all.

all the other cautioners. But a charge on a bond, wherein executors are seclused, will not make the sum moveable; for the design of the creditor is presumed to continue in favours of the heir, till the sum be paid, or the bond innovated: and for the same reason, a requisition used by a wife, who has an heritable sum that falls not under the *jus mariti*, will not make it moveable, since it is presumed she designed only to get payment, but not to give it to her husband.

8. But if the creditor who required his money take annualrent after that requisition, it is presumed that he again-altered his inclination, and resolved to have it heritable, and to continue due by virtue of the first security.

9. Tho' a bond be heritable, as bearing annualrent, yet before the term of payment it is moveable as to all persons.

10. From all which it is clear, that some sums are moveable as to the executor, but not as to the fisk or relief; and some may be moveable as to the debtor and his executors, and yet may be heritable

table as to the creditor, and those representing him; as for instance, an obligation to employ a sum due by a moveable bond upon land or annualrent, for the heirs of a marriage, that sum, as to the creditor, would be heritable, yet *quoad* the debtor it would remain moveable.

T I T L E III.

Of the constitution of heritable rights by charters and sasines.

1. **H**AVING treated in the former chapter of the difference betwixt heritable and moveable rights, it is now fit to begin with heritable rights, as the more noble.

2. Our heritable rights are regulated by the *Feudum*. *Feudum*. Fendal Law, by which *feudum*, which we call a feu, was defined to be, *A free and gratuitous right to lands made to one, for service to be performed by him.* He who grants this feu is in our law called the superior, and he to whom it is granted is called the vassal: the superior's right.

Superior
and vassal.

right to the fee is called *dominium directum*, and the vassal's right is called *dominium utile*; and if that vassal disposes the land to be holden of himself, then that other person who receives that fee is called the sub-vassal; whereas the vassal who granted the fee becomes the immediate superior to this sub-vassal, and the vassal's superior becomes the sub-vassal's mediate superior, and is so called because there is another superior interjected betwixt him and the sub-vassal.

Dominium directum & utile.

Sub-vassal.

3. The superior disposes ordinarily this fee, to be holden of him by a charter and fine. The charter is in effect the disposition of the fee made by the superior to the vassal: and when it is first granted, it is called an original charter or right; and when it is renewed, it is called a right by progress: and proceeds either upon resignation, when the lands are resigned in the superior's hands for new investiture, either in favours of the vassal himself, or of some third party; or by confirmation, when the superior confirms the right formerly granted: and if it is to be holden from

from the disponer of the superior, that is called *a me*, and is a public right, and is still drawn back to the date of the right confirmed: but if the confirmation be only of rights to be holden of the vassal, it is called *de me*, and is a base right; the effect of this charter being to secure against forfeiture, or recognition of the superior, all which are voluntary rights; but if they be granted in obedience to a charge upon apprising or adjudication, they are necessary.

4. If the charter contains a clause *de novodamus*, then it has the effect of an original right, and secures against all casualties due to the superior.

5. In charters the first thing expressed is for what cause it was granted; and if it was granted for love and favour, our law calls that a lucrative cause; or for a price and good deeds, this we call an onerous cause.

Cause
onerous
and lu-
crative.

6. The second thing considerable in a charter is the dispositive clause, which contains the lands that are disposed; and, regularly, with us the charter will give right

Disposi-
tive
clause.

right to no lands but what are contained in this clause, though they be enumerated in other places of the charter.

7. The third clause is that wherein is expressed the way how the lands are to be holden of the superior; and this is called the *tenendas*, from the first word of the clause.

Tenendas.

8. The fourth clause is that which expresses what the vassal is to pay to the superior; and this duty is called the *reddendo*, because the clause whereby it is payable begins *Reddendo inde annuatim*.

Reddendo.

9. The fifth clause is the clause of warrandice, which is either personal or real. Personal warrandice is when the author or disponent is bound personally; and is either, Simple warrandice, which is only from subsequent and future deeds of the granter, and this warrandice is implied in pure donations; or, 2^{do}, Warrandice from fact and deed, which is, that the granter hath not done, or shall not do, any deed prejudicial to the right warranted; or, 3^{tho}, Warrandice is absolute, and that is to warrant against all mortals; and

Warrandice personal and real.

Simple warrandice.

Warrandice from fact and deed.

Absolute warrandice.

in absolute warrandice this is a rule, that an adequate onerous cause presumes still absolute warrandice; but absolute warrandice in assignations imports only that the debt is truly due, and not that the debtor is solvent.

10. All rights granted by the king are presumed to be donations, and import no warrandice.

Real
warran-
dice.

11. Real warrandice is when infestment of one tenement is given in security of another.

12. The effect of warrandice is, that if the thing warranted be taken away, there is competent to the party, to whom the warrandice is granted, an action of eviction.

13. As warrandice infers relief, so excambion infers regrefs; that is to say, the party from whom the excambed lands are evicted, either by a deed of the excamber, or a defect of the right, has regrefs and recourse to the lands which he excambed, with the lands which are evicted: and this arises from the nature of the excambion, without express paction, and is competent

petent to, as well as against, the singular successors of exchangers and their heirs.

14. Because tradition is requisite to the completing of all rights, therefore the charter contains a command by the superior to his baillie, to give actual state and *fasine* to the vassal, or to his attorney, by tradition of earth and stone: and this is called the precept of *fasine*; and upon it the vassal, or some other person having a procuratory from him, gets from the baillie earth and stone, delivered in presence of a notary and two witnesses; which instrument is called a *fasine*. And if the superior gives *fasine* himself, it is called a *fasine propriis manibus*: so that a formal *fasine* is the instrument of a notar, bearing the delivery of earth and stone, or some other symbols, by the superior or his baillie, to the vassal or his attorney; the tenor whereof is known and fixed; and now, by a late statute, the witnesses must subscribe the instrument*. And thus the vassal stands inest in the land by charter and *fasine*.

Precept
of *fasine*.

Fasine.

*Fasine
propriis
manibus.*

* Parl.
1681.
c. 5.

15. This *fasine* being but the assertion

G 2

of

of the notar, proves not, except the warrant of it, that is to say, the precept or disposition whereon it proceeded, be produced: but a sasine given by a husband to his wife, or by a superior to his vassal, *propriis manibus*, without a precept, is sufficient, when the competition is with the granter's own heirs, or with no more solemn rights, and is not exorbitant; and after 40 years there is no necessity to produce either precept of sasine, or procuratory of resignation, by a special statute *.

* Parl.
1594.
c. 218.
n. 1.

16. This sasine must be registrated within 60 days, either in the general register at Edinburgh, or in the particular register of the shire, stewartry or regality where the land lyes †, else the right will not be valid against a singular successor; that is to say, if any other person buy the land, he will not be obliged to take notice of that sasine, but the right will still be good against the granter and his heirs.

† Parl.
1617.
c. 16.

17. If lands ly discontigue, every tenement must have a special sasine, except they be united in one tenement, and then

one

one fassine serves for all, if there be a special place expressed where fassine should be taken: but if there be no place expressed, then a fassine upon any part will be sufficient for the whole contiguous tenements, these being naturally unite; but will not be sufficient for lands lying discontinuous. And one fassine will serve for all tenements of one kind; but where they are of several kinds; as lands, mills; or holden of different superiors, or by a different holding of the same superior, these, though contiguous, will require several fassines, the symbols of possession being different; for lands pass by the tradition of earth and stone, and mills by the clap and happer.

18. Sometimes lands are erected into a barony, (the nature of which is explained before, title *inferior judges*) and whensoever this is granted, union is implied as the lesser degree.

19. Erection into a barony can only be by the king, and is not communicable by any subaltern rights, albeit the whole

Erection
into a barony.

barony be disposed, though the union may be thereby communicated.

20. This union can only be granted by the king; which he may grant either originally, or by confirmation; and being so granted, it may be transmitted by the receiver to a sub-vassal. But if a part of the lands united be disposed, the whole union is not dissolved, but the part disposed only: and this union, and all other privileges and provisions, can only be granted in the charter, but not in the *sa-
fine*.

21. Real rights being thus established by charter and *sa-
fine*, are not affected or burdened by back-bonds or other personal declarations; so that singular successors are not obliged to take notice of them: but till they are so compleated, such declarations (tho' personal) do affect them, and are valid against singular successors. But they affect personal rights, such as bonds or contracts, even though they be not intimated.

TITLE IV.

Of the several kinds of holding.

1. **T**HE first division of feus from the several kinds of holding, is that some lands hold ward, some feu, some blench, and some burgage.

Division
of feus.

2. For understanding wardholdings, it is fit to know, that at first all feus were rights granted by the Longobards, and the other northern nations, when they conquered Italy, to their own soldiers, for service to be done in the wars; and therefore ward-holding, which is the properest holding, is called *servitium militare*; and all lands are therefore presumed to hold ward, except another holding be expressed; and *servitium debitum & consuetum* is interpreted to be ward-holding.

Ward.

3. The advantages arising to the superior by the speciality of this holding are, that the superior has thereby the full mails and duties of the ward-lands, during the years

• Parl.

1547.

c. 5.

Parl.

1571.

c. 42.

years that his male-vassal is minor *: for the feu being originally given to the vassal for military service, it returns to the superior during minority; because the law presumes that the minor is not able to serve his superior in the wars: but in female vassals this casualty lasts only till fourteen years compleat; because they may then marry husbands who may be able to serve the superior; and this properly is called the casualty of ward; for marriage is due in other holdings, as shall be cleared in the next title.

4. Sometimes the superior is content to accept a liquid quota or annual prestation, in place of the mails and duties that fall to him by the ward, and this holding is called tax-ward: the marriage is also tax'd in that case to a particular sum. But though these tax-ward and tax'd marriage duties become *debita fundi*, they being expressed in the *reddendo*; yet, because the holding remains still a ward-holding, therefore lands holding tax-ward recognise, if they be disposed without consent of the superior. When

a vassal holds immediately ward of the king, and a sub-vassal holds ward of that vassal, this is called black ward, or ward upon ward.

5. Feu-holdings is that whereby the vassal is obliged to pay to the superior a sum of money yearly, in name of feu-duty, *nomine feudi-firmæ*.

Feu-holding.

6. This holding has some resemblance with the *emphyteusis* in the Roman law, but is not the same with it; for *emphyteusis* was a perpetual location, containing a pension, as the hire which was granted for improving and cultivating barren ground: but our feu-holding comes from the Feudal Law, (whereof there is no vestige in the Civil Law) and passes by inheritance to heirs.

Emphyteusis.

7. Blench-holding is that whereby the vassal is to pay an elusory duty, merely for acknowledgment, as a penny, or a pair of gloves, *nomine albæ firmæ*, and ordinarily it bears *si petatur tantum*.

Blench-holding.

8. These blench-duties are not due, whether they be of a yearly growth or not, except they be required yearly by the superior *;

• Parl.
1606.
c. 14.

gubled

perior*; as for instance, if the blench-duty be yearly attendance at such a place, or a rose yearly, the superior can seek nothing for his blench-duties, except he require the same within the year. But the exchequer now puts a value upon every blench-duty that can be estimated, such as gloves or spurs, and exacts them for all bygone years within prescription, tho' they be not required yearly.

Burgage-
holding.

9. Burgage-holding is that duty which burghs-royal are obliged to pay to the king, by the charters erecting them into a burgh-royal; and in this the burgh is the vassal, and not the particular burgesses; and the bailiffs of the burgh are the king's bailiffs: nor can fine in burgage lands be taken by any other than the bailiff and town-clerk †, if the town have any; and they must be registrated in the town-clerk's books ‡.

† Parl.
1567.
c. 27.
‡ Parl.
1681.
c. 11.

*Manum
mortuam.*

Mortifi-
cation,

10. When lands are mortified (which we call *ad manum mortuam*) to churches, hospitals, or other pious uses, the society to which the mortification is made becomes vassal; and the *reddendo* being only pre-
ces.

ces & lachrymæ, and the society never dying, the superior loses many casualties of the superiority; wherefore lands cannot be mortified without the superior's consent.

TITLE V.

Of the casualties due to the superior.

1. **T**HE feu being thus stated by the superior in the person of his vassal, it will be fit, in the next place, to consider what right the superior retains, and what right the vassal acquires, by this constitution of the feu.

2. The superior retains still *dominium directum* in the feu, and the vassal has only *dominium utile*; and therefore the superior is still infeft, as well as the vassal: but the king needs not be infeft, for he is infeft *jure coronæ* in all the lands of Scotland; that is to say, his being king is equivalent to an infeftment.

3. The superior has different advantages and rights, according to the different manner

manner of holdings; and there are some rights and casualties common to all holdings.

4. Ward-holdings give the superior a right to the mails and duties of his vassal's lands during all the years that his vassal is minor; and this is properly called the casualty of ward: but the superior, or his donator, are obliged to entertain the heir, if he have no other feu or blench lands, and to uphold the house, parks, &c. in as good condition as they found them; and must find caution for that effect.

• Parl.
1491.
c. 25.
Parl.
1535.
c. 15.

Recog-
nition.
† Stat.
R. III.
c. 19.
Sec. 4.

5. If the vassal sells or disposes the half of his ward-lands to any except his apparent heir, who is *aliouqui successurus*, without the consent of his superior, the whole ward-lands fall to the superior for ever; and this we call recognition†; which is introduced to punish the ingratitude of the vassal, who should not have disposed the lands which it is presumed he got gratuitously from the superior, without his own consent. And to shun this, the vassal in ward-lands gets the superior's

perior's confirmation before he takes infestment: for if he take infestment before he be confirmed, the lands recognise, as said is, since the vassal shows sufficiently his ingratitude by the very taking of the infestment. But if the sashine be null in itself, it infers no recognition, because in that case there is no right transmitted.

6. And though the vassal at first did not sell the half without the superior's consent, yet if he thereafter sells as much as will extend to more than the half of the feu, the first buyer will likewise lose his right, if it was not confirmed before he took infestment. And this holds even where the lands are but wadset, tho' the back-tack-duty does not extend to the equal half of the value of the lands, if the lands wadset exceed the major part of the tenement. But alienation of teinds infers not this casualty, because they are not holden ward.

7. Not only a confirmation, or *novodamus*, (if it express recognition) but the superior accepting service, or pursuing for the casualties, or accepting right from

Novodamus.

H

the

the vassal posterior to the deeds inferring recognition, are a passing from the recognition; because they infer the superior's acknowledgment of the vassal's right. And inhibition raised and executed before the recognition be incurred, secures against the same, by a late statute*.

* Parl.
1686.
c. 15.

8. Recognition takes place in taxt-ward as well as simple ward, but in no other manner of holding, except the same be expressly provided in the vassal's charter; for ward-holding is presumed to be the only proper feudal right.

Discla-
mation.
St.R.III.
c. 18.
R. M.
l.2. c.63.
sect. 6.

9. If the vassal denieth the superior, he loses his feu, and this is called disclamation: but any probable ground of ignorance will take off this forfeiture.

10. If the vassal who holds ward-lands dies, having an heir unmarried, whether minor or major, the superior gets the value of his tocher, tho' he offer him not a woman to be his wife; but if the superior offers him his equal for a wife, and he refuses to accept her, and marries any other person, the superior gets the double of his tocher. And one of these casualties is

is called the single avail of the marriage, and the other the double avail of the marriage. But the modification of this is referred to the lords of session, who consider still what was the vassal's free rent, all debts deduced; and the ordinary modification of the single avail is about two years rent of the vassal's free estate, even though the heir was heretrix; and the double avail is but a year more, which is three years free rent: and though there were more heirs-portioners, there will only one avail be due for them all.

Avail of marriage.

The single and double avail of the marriage.

11. Though this casualty of marriage be still due in all ward-holdings, yet they may be due by express paction in other holdings; and there are many in Scotland who hold their lands feu, *cum maritagio*: and in both cases, the marriage is *debitum fundi*.

12. Tho', as to the casualty of ward, every superior has right to the ward-lands holding of himself, where the vassal holds ward-lands of more superiors; yet the casualty of marriage falls only to the eldest superior, because there cannot be

more tochers than one, and he is the eldest superior from whom the vassal had the first feu; but the king is still presumed to be the eldest superior, because all feus originally flowed from him.

13. It is thought that the reason why this casualty is due, was because it was not just that the vassal should bring in a stranger to be mistress of the feu without the superior's consent; for else he might chuse a wife out of a family that were an enemy to the superior. But I rather think that both ward and matriage proceeded from an express paction betwixt King Malcom Kanmore and his subjects, when he first feued out the whole lands of Scotland amongst them, as is to be seen in the first of his statutes *.

* Leg.
Milc.
c. 1.
Feu-
duty.

14. The special duty arising to the superior in a feu holding is, that the superior gets a yearly feu-duty paid to him; and if no part of this feu-duty be paid for three years, then the vassal loses his feu, *ob non solutum cannonem*, for the feu-duty is called *cannon*: and if this provision be expressed in his charter, he will not be allowed to
purge

purge this irritancy, by offering bygones at the bar. But though this provision be not expressed in the charter, yet the feu will be annulled for non-payment of the feu-duty, by an express act of parliament *: but the vassal, in that case, will be allowed to purge at the bar; and the reason of this difference is, because the express paction is thought a stronger tie than the mere statute.

* Parl.
1597.
c. 250.

15. A clause irritant in our law signifies any provision which makes a penalty to be incurred, and the obligation to be null for the future: as where the superior gives out his feu upon express condition, that if the feu-duty be not paid, the feu shall be null and reduceable. And a clause resolute is a provision, whereby the contract to which it is affixed is, for non-performance, declared to have been null from the beginning.

Clause
irritant.

Clause
resolu-
tive.

16. The casualties that are due by all manner of holdings, and which arise from the very nature of the feu, without any express paction, are non-entry, relief, and liferent escheat.

H 3.

17. Non-

Non-
entry.

17. Non-entry is a casualty whereby the superior has right to the mails and duties of the lands when there is not a vassal actually entered to the lands, or where the vassal's right is reduced after he is entered: and the reason why this is due to him is, because he having given out his feu to his vassal for service, when there is no vassal entered, the law allows him to have recourse to his own feu, that he may therewith provide himself a vassal who may serve him. But though the full rents of the lands be due to the superior from the very time that he cites his vassal to hear and see it found and declared that the lands are in non-entry; yet, before that citation, the superior gets only the retoured duties; and the reason of the difference is, because after citation there is a greater contempt than before, and so is to be more severely punished.

Retoured
duty.

18. For understanding which retoured duty it is fit to know, that there was of old a general valuation of all the lands of Scotland, but thereafter there was a new valuation; the first whereof is called the old,

old, and the second the new extent; and both are called the retoured duty, because they are expressed in the retour or return that is made to the chancellary when an heir is served; but both are very far below the value to which lands are now improved, though in our law the new extent be constructed to be the value. But if the lands be not retoured, the donator to the non-entry will have right to the full mails and duties, even before citation. The old extent is said to be made *tempore pacis*, and the new extent *tempore belli*; and the most probable reason of these terms is, that the first valuation was very mean, being made in time of peace; but our kings being engaged thereafter in war with the English, there was a new valuation made, much greater than the first, to augment the revenue, for maintenance of the war; and therefore the new extent or valuation is said to be made *tempore belli*.

19. But in an infeftment of annualrent, the whole annualrent is due, as well before declarator as after; because the whole annualrent is the retoured duty, it being
retoured

Infeſt-
ment of
annual-
rent.

retoured *valere ſeipſum*. And that is called an infeſtment of annualrent, when the vaſſal is not infeſt in the property of the particular lands, but is infeſt in an yearly annuity of money, to be paid out of the lands; as for inſtance, if a man ſhould be infeſt in the ſum of 500 merks yearly, to be payable out of any particular lands, being worth 500 merks yearly; how ſoon the vaſſal who had right to the 500 merks died, the ſuperior would have right to the whole annualrent yearly, until the heir of the vaſſal be entered. *Vide infra*, Tit. *Redeemable rights*, § 14.

20. There is no non-entry due in bur-
gage lands, becauſe the burgh itſelf is vaſ-
ſal, and never dies; and ſo therefore, nei-
ther does the burgh, nor any private bur-
geſs, pay non-entry, the duty payable by
the burgeſſes being only watching and
warding; and yet their liſerent, as well as
ſingle eſcheats, fall to the king. The
non-entry ſubſequent to the ward is of
the nature of the ward; and if the ſu-
perior or donator were in poſſeſſion, they
have

have right to the full malls and duties, without any declarator: but in that case the donator's right extends only to three terms subsequent to the ward, after which there is place for a second donator.

20. When the vassal enters, he pays an acknowledgment to the superior, which is called relief, because it is paid for relieving his land out of the superior's hands: it is *debitum fundi*, and affects not only the ground really, but the vassal personally, who takes out the precept for infesting himself, though he never takes infestment thereupon.

Relief

22. The value of this casualty varies according to the nature of the holding; for in blench and feu holdings it is only the double of the feu or blench-duties; but in ward-holdings it is the full duty of the land, if the superior be in possession the time of the vassal's entry; but if the superior was not in possession, even though the vassal was minor, then the superior gets only the retoured duty: and it is so far from being presumed to be remitted by the superior's entering his vassal,

sal, that it is still exacted by the exchequer, though it be gifted with the other casualties.

**Liferent
escheat.**

23. For understanding liferent escheats it is fit to know, that when any man does not pay a debt, or perform a deed, conform to his obligation, his obligation is registrated, if it carry a consent to the registration in the body of it; or if it do not, there must be a sentence recovered, and upon that registrated writ or decreet (for a registrated writ is a decreet in the construction of law) there will be letters of horning raised, and the party will be charged; and if he pay not within the days allowed by the charge, he will be denounced rebel, and put to the horn; and from the very date of the denunciation all his moveables fall to the king, by a casualty which is called single escheat: but now single escheats fall likewise to lords of regalities, if the persons denounced live within a regality, because the king uses to gift all single escheats at the erection; but if they be not expressly gifted, they remain with the king.

**Single
escheat.**

24. Under

24. Under the single escheat fall all sums that are moveable *quoad fiscum*, and all bygone annualrents, even of heritable sums, and the bygone rents of lands, together with the crop that is upon the ground the time of the rebellion, and the mails and duties due at the term immediately subsequent to the rebellion.

25. If the vassal continue year and day rebel, without relaxing himself, (which relaxation is expedited by letters under the king's signet, expressly ordaining him to be relaxed from the rebellion) then he is esteemed as civilly dead; and consequently not being able to serve the superior, the law gives the superior the mails and duties of his feu during all the days of the vassal's life; and this casualty is called *liferent escheat*: so that every superior, as well as the king, has right to the mails and duties of the lands holden of himself*, if his vassal was once infest; and even though he was not infest, if he was apparent heir, and might have been infest, for his lying out should not prejudice his superior. But if a man have right by disposition,

Relaxa-
tion.

• Parl.
1535.
c. 32.

disposition, whereupon no investment followed, the king only will have right to his liferent escheat, since the singular successor not being yet invest by the superior, of whom he is to hold his lands, that superior cannot have right, and consequently his liferent falls to the king. And the liferent of ministers, in so far as concerns their manses and glebes, falls also to the king, because they require no investment, and are not holden of any other superior. But all heritable and liferent rights, requiring no investment of their own nature, such as a terce and liferent tacks, fall not to the king; and liferent tacks fall to the master of the ground; and the liferent by terce pertains to the superior during the liferenter's lifetime †.

† Parl.
1617.
c. 15.

26. This liferent escheat comprehends only rights to which the vassal himself had right for his lifetime; for else it will fall under single escheat; (single escheats comprehending every thing that is not a liferent escheat) and therefore, if the superior having right to the vassal's liferent escheat, become rebel himself, the vassal's
liferent

liferent escheat will fall under the superior's single escheat; for the superior had not right to those mails and duties during all the days of his own lifetime, and so it could not fall under his liferent. And the like does, for the same reason, hold in all such as have assignations to liferents, or to liferent escheats, or to tacks for any definite number of years, few or many.

27. The superior has also right to the sub-vassal's liferent escheat, which falls after the vassal's denunciation: for by the denunciation of the immediate vassal, the superior comes in his place, and so has right to the sub-vassal's liferent. But if the sub-vassal be first denounced, his liferent falls under the vassal's single escheat.

28. The liferent escheat falls by the rebellion, that is to say, by the denunciation: and the year and day is given only to the rebel to relax himself; so that if he relax not within that time, his liferent will fall from the denunciation.

29. In competitions betwixt the superior or the donatary, and the rebel's creditors,

tors, these rules are observed in our divisions: 1st, As to single escheats (which must be treated here, for their contingency with liferent-escheats, though single escheats fall not to the king as superior, but as king).

30. No legal diligences nor voluntary rights, for payment of any debt contracted after rebellion, will prejudice the king or his donatary; since otherwise a rebel at the horn might fraudulently contract debt to evacuate the escheat.

31. 2^{do}, If a lawful creditor for a debt prior to the rebellion compleat his diligence before declarator, he will be preferred to the donatary.

32. 3^{tio}, No voluntary assignation, tho' for a debt prior to the rebellion, if granted after rebellion, and compleated by intimation before declarator, will be preferred to the donatary; but actual payment will be preferred, if the debt was prior to the rebellion, and the payment obtained before declarator. As to liferent escheats, the rules in competitions run thus,

33. 1^{mo},

33. *1mo*, Tho' the debt was prior to the denunciation, no voluntary infeftment will prejudice the superior; except the rebel was obliged, prior to the rebellion, to grant that infeftment, and that the infeftment itself was expedite within year and day of the denunciation.

34. *2do*, Though legal diligence be more favourable than voluntary rights, because there is less collusion; yet no legal diligence will be preferred to the superior, except it was led for a debt prior to the denunciation, and was compleated by infeftment or charge, or that a signature was presented to the exchequer, (which in lands holding of the king is equivalent to a charge, since the king cannot be charged) within year and day thereof, albeit the said legal diligence was deduced after the denunciation.

35. Though this be the course in competitions *quoad* liferent escheats, yet actual payment made to, or diligences done by, creditors for payment of debts prior to the rebellion or the commission of crimes, will be preferred to the donatary,

if these rights or diligences be compleated before declarator ; which we owe rather to the benignity of our kings than to the nature of these rights, since there is *jus quæsitum fisco* by the denunciation.

36. Liferent escheats are proper to all kinds of holding, except burgage and mortification ; for the vassal being a society or incorporation dies not, and so can have no liferent escheat : and albeit the administrators were denounced for debts due by the incorporation, yet that is still presumed to be their negligence, which ought not to prejudice the society.

37. For compleating this casualty, a general declarator must be raised at the superior or donatary's instance, to hear and see it found and declared that the vassal was orderly denounced rebel, and has continued at the horn year and day. And in competitions betwixt donataries, the last gift, if first declared, will be preferred.

38. If the gift be taken to the behoof of the rebel, it is null ; and it is presumed to be to his behoof, if he or his family be suffered

suffered to stay in possession, or if the gift be procured by the rebel's means.

39. It is observeable, in temporary casualties, such as ward, non-entry, and in all consolidations of the property with the superiority, such as recognitions, bastardies, *ultimus heres*, the feu returns to the superior, burdened with all real rights to which he has consented by confirmation or otherwise, and with all these rights which the law hath established, without either paction of party, or consent of superior, such as terce and courtesy; and therefore such rights do in both cases defend against the superior. But when the lands return to the king by forfeiture, his majesty is not obliged to acknowledge either terce or courtesy, or any other right but what himself hath actually confirmed. And both the king and other superiors have no more right by liferent escheat than the vassal himself had formerly, since they come only in the vassal's place, who by his rebellion is rendered incapable to serve the superior.

40. When these casualities are gifted by the king, the writ by which they are transmitted is called a signature, (as all other writs are which pass his majesty's hand) and they are so called because they are signed by him: and they must be written by writers to the signet, and pass the signet.

41. If these signatures contain only temporary casualities, such as gifts of ward, marriage, escheat, &c. or only a right to moveables, they pass only the privy seal; for what right subjects transmit by assignments, his majesty transmits by the privy seal. But if the right require a formal disposition, and to be compleated by investment, it must be transmitted under the great seal; and the signatures ought to express what seals they should pass. All great offices and commissions to judicatures should likewise pass the great seal, except it be otherwise provided by law, as commissions of justiciary, which by act of parliament are allowed only to pass the quarter seal.

42. This

42. This quarter seal was originally invented for sealing writs which first passed the great seal, as precepts of assize upon charters past the great seal; and is therefore called the testimonial of the great seal, and the shape of it is the fourth part of the great seal. The great seal contains virtually the privy seal: and therefore though, when a man is forfeited, the right of his moveables should be transmitted by a right under the privy seal, and the right of his lands under the great seal; yet the lords have found that the right of the moveables may be transmitted in the same signature with the lands, if the moveables be therein expressly disposed and assigned.

43. These seals were invented to be checks upon such as obtained gifts from the king by subreption or obreption; that is to say, by concealing what is true, or expressing what is false: for even after the signature is past the king's hand, it may be stopt in these cases.

44. The last privilege of the superior is, that he may force his vassals to exhibit

·bite his evidents, to the end he may know what is the nature of the holding, and in what he is liable to him as his superior; which proceeds ordinarily by an action of improbation, whereby he will be forced to exhibite and produce his evidents, to shun the hazard of the certification in the improbation.

T I T L E VI.

Of the right which the vassal acquires by getting the feu.

I. **T**HE vassal by getting the feu settled in his person by charter and sasine, as said is, has right to all houses, castles, towers, (but not fortalices) woods, and other things that are above ground of the lands expressly disposed; and to coals, limestone and other things within ground, and to whatever has been possessed, as part and pertinent of the land, past memory of man. But there are some things which pass not under the general dispositive words, and require a special disposition,

disposition, which belong to the king in an eminent way, and are called therefore *regalia*, and are not presumed to have been disposed by his majesty, or any other superior, except they were specially mentioned, such as are all jurisdictions, forests, salmon-fishings, treasures hid within the ground, and gold, silver and fine lead; for other mines, such as iron, copper, &c. belong to the vassal*.

Regalia.

2. If lands be erected into a barony by the king, then, though the lands ly discontinuously, one sasine will serve for them all, because a barony implies an union.

* Parl.
1424.
c. 12.

3. This erecting them into a barony will likewise carry a right to jurisdictions, and courts, fortalices, forests, hunting of deer, and ports, with their small customs granted by the king for upholding these ports, mills, salmon-fishings, &c. because *baronia est nomen universitatis*, and possession of any part of a barony is reputed possession of the whole: but mines of gold and silver†, treasures, and goods confiscated, are not carried with the barony.

† Parl.
1424.
c. 12.

4. The

4. The heritor has also power to set tacks, remove and put in tenants, as a consequence of his property.

Tack.

5. A tack is a *location or contract, whereby the use of any thing is set to the tacksmen, for a certain hire*: and in our law it requires necessarily that the terms of the entry and the ish must be expressed; that is to say, when it should begin and end; and it must bear a particular duty, else it is null: and if it be a valid tack, that is to say, if writ be adhibited, (verbal tacks being only valid for one year) and the thing set, the contracters names, tack-duty, ish and entry, clearly therein expressed, and clothed with possession, it will defend the poor tacksmen against any buyer*; which was introduced in favours of poor tenants, for encouraging them to improve the land: but it will not defend against a superior of ward lands, for the ward, &c. though by act of parliament the superior be obliged to continue them in their possession till the next term of Whitsunday ‡.

• Parl.
1449.
c. 18.

‡ Parl.
1491.
c. 26.

6. Albeit

6. Albeit tacks have not all the solemnities aforesaid, yet they are valid against the granter and his heirs.

7. Tenants cannot assign their tacks, except they be liferent-tacks, or that the tack bear a power to assign: but they may be comprised or adjudged. And if the master suffer the tacksmen to continue after the tack is expired, he will be obliged to pay no more than he paid formerly during the tack; and this is called in our law the benefit of a tacit relocation, that is to say, both the setter and the tacksmen are presumed to design to continue the tack upon the former terms, till the tenant be warned.

Tacit
reloca-
tion.

8. If the tack be granted to sub-tenants, then the tacksmen may set a sub-tack, which will be as valid as the principal tack, if clothed with possession.

9. Rentals are also a kind of tacks, but more favourable and easy, because the rentaler and his predecessors have been antient possessors and kindly tenants; and he pays a grassum or acknowledgment at his entry: and yet they last no longer than

Rentals.

than for a year, if there be no time expressed; and if they be granted to a man and his heirs, they last only to the first heir, for else they behoved for ever to belong to the heirs, and so would want an heir. But no tack is accounted a rental except it be in writ, and the writ bear the same.

10. Rentals cannot be assigned, except that power be granted in the rental; and if the rentaler assign, he loses his rental: though a tacksmen forfeits not his right by assigning it, the assignation being only null.

Remov-
ing so-
lemn and
summar.

11. When the years of the tack expire, or though there be no tack, yet the master cannot summarily remove his tenant or possessor, except from liferented lands and houses, or towers and fortalices, and vitious possessors, whom he can remove by a summons on six days; but in all other cases he must warn him forty days before the term of Whitsunday, tho' the term at which he were to remove by paction were Martinmas or Candlemas; which warning must be executed, that is

to say, intimated personally to the tenant, and upon the ground of the lands, and at the parish Kirk, immediately after sermon; in both which places copies of the warning are to be left. And if he then refuses, he must be pursued to remove upon six days; and after this citation the master will get against him violent profits, that is to say, the double of the mail of the tenement within burgh, and the highest advantages that the heritor could have got if the tenant possessed lands in the country. Nor will the tenant be allowed to defend against this removing, till he find caution to pay the violent profits*.

12. The master has likewise a tacit hypothecque in the fruits of the ground, which he sets to his tenant, in so far as concerns a year's duty, that is to say, they are impignorated by the law for that year's duty; and he will be preferred, either to a creditor who has done diligence, or to a stranger who has bought them, though in a public market. And the land's lord within burgh has a tacit

* Parl.

1555.

c. 39.

Tacit

hypo-

thecque.

K

hypothecque

hypothèque in all the goods brought into his house by his tenant, which he may retain ay and while he be paid of his year's rent. Which tacit hypothèque the superior has also for his feu-duty.

T I T L E VII.

Of transmission of rights by confirmation; and of the difference betwixt base and public infestments.

Ways of
transmit-
ting fees.

1. **T**HE fee being thus established in the vassal's person, the same may be transmitted either to universal or singular successors. The first is properly called succession, which shall be handled in the third book. Transmission of rights to singular successors is voluntary, by disposition and assignation; or necessary, by apprising and adjudication, and by confiscation, when they are forfeited for crimes, &c.

2. If the vassal sells the land, the superior is not obliged to receive the sub-vassal except he pleases, though the charter bear

bear to him and his assigneys: and if he receive him, there is in law a year's rent due to the superior, as an acknowledgment for changing his vassal.

3. Lands are disposed, either to be holden of the disposer's superior, and that is called a public infestment, because it is presumed it will be publicly known, being holden of the superior; and it is likewise called an infestment *a me*, because the disposer gives it to be holden *a me, de superiore meo*; and this infestment is null, until it be confirmed by the superior *, which is done by a charter of confirmation wherein the superior narrates the vassal's charter, and subjoins thereto his own confirmation or ratification of it: and the last right, being first confirmed, is still preferred †.

4. Sometimes also the vassal disposes lands to be holden of himself, and this is called a base infestment, and has been allowed by our law (contrary to the principles of the Feudal Law) in favour of creditors, who getting right for payment of their debts, were unwilling to be at the

Infest-
ment pu-
blic.

* Parl.
1578.
c. 66.

† Act
foresaid.

Base in-
festment

Infest-
ment *de*
me.

expences to get a confirmation from the superior; and this is called an infestment *de me*, because the disponer gives them *tenendas de me, & successoribus meis.*

5. These base infestments being clothed with possession, are as perfect and valid as a public infestment; for possession is to an infestment to be holden of the disponer, the same thing that confirmation is to an infestment to be holden of the superior. And therefore, as in a competition betwixt two infestments of the same lands to be holden of the superior, the first confirmation would be preferred, it being a general rule in law, that amongst rights of equal perfection *prior tempore est potior jure*; so, if a base infestment be clothed with possession before the public infestment be confirmed, the base infestment will be preferred, though it was granted after the public infestment.

Possessi-
on natu-
ral and
civil.

6. For the better understanding of the nature of base infestments, it is fit to know, that possession is in law natural or civil. That is natural possession, by which a man is naturally and corporally in possession,

as by labouring of the ground. But because sometimes men could not attain to the natural possession for completing their rights, therefore the law was forced to allow another possession by the mind, as that was by the body; and this is called civil possession, because it is allowed and introduced by the Civil Law; of which there are many kinds in Scotland; as,

7. *imo*, The obtaining decreets for mails and duties, and even citation upon an heritable right.

8. *ado*, Payment of annualrent by the debtor to the creditor, who has infeftment of annualrent.

9. *3tio*, If a man be infeft in lands, and for warrandice of these lands be infeft in other lands, possession of the principal lands is reputed in the construction of law possession of the warrandice lands.

10. *4to*, If a woman be infeft by her husband in a liferent, the husband's possession is accounted the wife's possession.

11. *5to*, If a man dispone lands, reserving his own liferent, the liferenter's possession is accounted the fiar's possession.

on : and a base infeftment is faid to be clothed with poffeffion, if he who is infeft hath attained either to natural or civil poffeffion ; for the law cannot punifh a man for not apprehending poffeffion, who could not apprehend it. And, for the fame reafon, if the time of entry was not come, he who is infeft by a base infeftment will be preferred in that cafe, as if he were in poffeffion. And the reafon of all this is, becaufe our law, confidering that base infeftments were clandestinely made betwixt confident and conjunct perfons, to the ruin of lawful creditors, who could not know the fame, there being then no register of fafines ; it therefore declared all base infeftments to be fimulat, which were not clothed with poffeffion ; and therefore, before the term at which he who got the base infeftment could enter to the poffeffion, there could be no simulation or fraud in any party. And in this, the law confiders much the intereft of lawful creditors, by fuftraining that kind of poffeffion in their favour, which would not be fuftrained in favours of near relations,

tions, or where there is no onerous cause. And thus a base infestment given by a father to his own son will not be clothed with possession by the reservation of the father's liferent, though the reservation of the father's liferent would clothe a base infestment granted by him to a lawful creditor. And the husband's possession is accounted the wife's possession in so far as concerns her principal jointure, but not in so far as concerns her additional jointure, in a competition betwixt her and her husband's lawful creditors.

12. There is another possession also, called *per constitutum*, which is, when a man who gets a wadset sets back the wadset-lands to the disponent, for payment of a tack-duty called the back-tack-duty: and the wadsetter receiving payment of that back-tack-duty, is said to possess the wadset-lands *per constitutum*.

13. Sometimes, likewise, for the more security, a base infestment which is given to be holden of the disponent, will be confirmed by the superior; but that confirmation does not make it a public infestment,

Confir-
mation,

ment, for no infestment can be called a public infestment but that which is to be holden of the superior. But the use of that confirmation is, that after the superior has confirmed voluntarily the sub-vassal's right, he thereby acknowledges his right, and consequently can seek no casualty, which arises upon want of the superior's consent, such as forfeiture or recognition: but because the disponent is still vassal, therefore his superior will still have right to the rents of the lands by his life-rent-escheat, and to wards and non-entries by his death. But if the superior enter the sub-vassal only upon a charge, (this being no voluntary act of his) that does not cut him off from those casualties.

14. Sometimes, likewise, the seller resigns the lands in favour of the superior, if the lands be sold to the superior himself; which is called *resignatio ad remanentiam*, because the lands are resigned to remain with the superior; and in that case the property is said to be consolidated with the superiority; that is to say, the superior returns to have all the right, both

*Resignatio
ad rema-
nentiam.*

Both of property and superiority; nor needs he be infeft of new, because (as we formerly observed) the superior stands still infeft, as well as the vassal. But the instrument of resignation must be registered in this case, as sales are in other cases, to put men in *mala fide* to buy *.

15. The other resignation is called *resignatio in favorem*; which is when a seller having sold his feu to a third party, resigns the feu in the superior's hands for new infeftment to be given by the superior to that third party.

16. The warrant of both these resignations is a procuratory granted by the seller to a blank person, (and this warrant is ordinarily inserted in the disposition) empowering him to resign the feu in the superior's hands; and this is called a procuratory of resignation; and the symbols of the resignation are a staff and baston; and accordingly the procurator appears, before the superior, and upon his knee holding a staff or pen at the one end, which the superior, or any having power from him, holds by the other, whereby he resigns

* Parl.

1669.

c. 3.

*Resignatio
in favo-
rem.*Procura-
tory of
resigna-
tion.

Instru-
ment of
resigna-
tion.

resigns the feu, either *ad remanentiam*, or *in favorem*, as said is; whereupon an instrument is taken by the person in whose favour the resignation is made, which is called the instrument of resignation; and thereafter the person in whose favour the resignation is made (if he be not the superior) is infeft, and his sasine must be registered within 60 days, as said is.

17. The resignation does not perfectly denude the seller, until infeftment be taken upon it; and therefore the first infeftment, upon a second resignation, will be preferred to him who has but the second infeftment upon the first resignation. But yet the lands will be in non-entry in the superior's hand after the resignation is made, until the person in whose favour it was made be infeft; for otherwise the superior would want a vassal, since he could not call him vassal, from whom he had accepted of a resignation; nor is the person in whose favour the resignation is made his vassal, since he is not yet infeft. But yet the buyer has a personal action against the superior, to force him to denude

nude himself in his favour, since he has accepted the resignation: and he will likewise have an action of damage and interest against the superior, if he accept a second resignation, whereby a prior infeftment may be taken to his prejudice. And until infeftment be taken, the superior gets all his casualities, as ward, marriage, life-rent escheat, &c. not by him in whose favour resignation is made, but by him who resigns, since he remains still vassal till the other be infeft, *quoad* the superior's casualities.

T I T L E V I I I .

Of redeemable rights.

1. **A** Nother considerable division of heritable rights with us is, that some are redeemable, and some irredeemable.

2. Redeemable rights are these which *return to the disponent upon payment of the sum for which these rights are granted; and are so called, because they may be redeemed*

Redeemable
rights.

deemed by the disponent: and they are either wadsets, infeftments of annualrent, or infeftments for relief.

Wadset.

3. A wadset is a right whereby lands are impignorated or pledged for security of a special sum, which passes by infeftment (like other real rights) in the terms of alienation or disposition; and the disponent does secure himself by getting a reversion from the buyer, wherein he grants and declares the lands redeemable from him, upon payment of the sum then delivered, and of the annualrent thereof, which is *pactum de retrovendendo*; and expresses the place and time when and where it is to be delivered, and in whose hands it is to be consigned, in case the receiver of the wadset refuse to accept his money. Reversions may be either granted by a paper apart, or they may be contained in the body of the right; and are then said to be incorporated in *gremio juris*.

Reversion.

4. These reversions, being against the nature of property, and depending upon the mere agreement of parties, are to be
most

most strictly observed, and are *strictissimi juris*, so that they are not extended to heirs or voluntary assignees, except they be expressed: but yet they may be apprised, which is allowed for the good of commerce, though a compriiser be in effect a judicial assigney. Reversions must be fulfilled in the very terms, and it is not enough that they be fulfilled in equipollent terms: but after an order of redemption is used, that is, after the granter of the wadset has duly premonished the wadsetter, and consigned the sums due by the wadsetter, it may be assigned: and tho' the reversion bears, that premonition be made at the parish church, it will be sustained if it be made personally to the wadsetter, for that is a surer certioration.

5. Reversions, albeit of their own nature they are personal, binding only the granter and his heirs, yet they are real rights by our statutes, and affect singular successors*.

6. All reversions, (except they be incorporated, as said is) and all bonds to make reversions, or eikes to reversions,

L

must

• Parl.
1469.
c. 27.

† Parl.
1617.
c. 16.

be registrated within sixty days, in the same register with fines; for else a singular successor is not obliged to regard them †; so that if any buy the land irredeemably, and compleat his right before registration of it, though after infestment upon the wadset, he will be preferred: but they are still valid against the disposer and his heirs, without registration.

Order of
redemption.

7. When the granter of the wadset is to use an order of redemption, he must premonish the wadsetter to compare, (and take instruments thereupon, called an instrument of premonition) to receive payment of the sums due to him. And at the time and place appointed by the reversion, offer being made of the money, if the wadsetter refuses voluntarily to renounce, and to accept his money, it is consigned in the hands of the person designed in the reversion; or, if no person be designed, it may be consigned in any responsible man's hand: but there must be a paper taken under the consignatar's hand, acknowledging that it was consigned in his hand; for though an instrument

ment under a notary's hand proves that all this order of redemption was used, yet it will not prove the receipt of a sum against the consignatory.

8. If the wadsetter receive his money, and renounce voluntarily, this is called a voluntary redemption: but though renunciations be sufficient to extinguish a wadset, (if no infestment followed) whether the wadset was to be holden of the granter or superior, or to extinguish it *quoad* the granter and his heirs, though infestment followed; yet if the wadset was given to be holden of the disponent, the wadsetter must resign *ad remanentiam* in the disponent's hands as his superior; and thereafter the disponent needs not to be infest of new, as no superior needs: but if the wadset be given to be holden of the superior, then the disponent uses to take a letter of regrefs, whereby the superior obliges him to receive back his vassal when he shall redeem his own lands; for otherways, after the wadsetter is seised, the superior is not obliged to receive him back; but, the lands being redeemed,

Voluntary redemption.

Letters of regrefs.

the superior may be charged to infect him, which is necessary for re-establishing the right in his person.

Decla-
rator of
redemp-
tion.

9. If the wadsetter refuses to renounce after the order is used, the lords will force him to renounce, and declare the lands redeemed, by a process called a declarator of redemption; after obtaining of which decret the lands are redeemed, and belong to the redeemer, and the wadsetter will, upon a simple charge of hording, force the consignatory to deliver him up the money.

10. The user of the order of redemption may pass from it at any time before declarator; and therefore the sums for which the wadset was granted are still heritable before declarator, but after that, they are moveable and fall to executors, except the declarator be obtained after the wadsetter's death, in which case they remain heritable. And though the wadsetter require his money, he may pass from his requisition, either directly by a clear declaration that he passes from it, or indirectly, by intromitting with the duties of
the

the wadset lands, or by taking annualrent for terms subsequent to the requisition.

11. Wadsets are either proper or improper.

Wadsets
proper
and im-
proper.

12. Proper wadsets are these wherein the wadsetter takes his hazard of the rents of the land for the satisfaction of his annualrent, and pays himself all public burdens. Improper wadsets are these wherein the granter of the wadset pays the public burdens, and the receiver is at no hazard, but has his annualrent secure. And if a wadset be taken, so that the wadsetter is to have more than his annualrent, and yet the granter is to pay the public burdens, and free him of all hazards; this is accounted usury by our law, the punishment whereof is confiscation of moveables, losing of the principal sum, and annulling the usurious contract or paction *. And, by a late statute, if the debtor, even in a proper wadset, offers security for the money, and craves possession, the wadsetter must either quit his possession, or restrict himself to his annualrent †: or, if it be an improper wad-

Usury.

• Parl.
1594.
c. 222.
Parl.
1597.
c. 251.
† Parl.
1661.
c. 62.
sect. 16.

set, the wadsetter must impute the superplus more than pays his annualrent, *in sortem*. And if a man impignorate his lands or bonds, with exprefs condition, that if the money be not paid at a precise day, they shall not be thereafter redeemable, the law reprobates this unjust advantage, called *pactum legis commissoriae in pignoribus*, and will allow the money to be offered at the bar; or they will allow a short time before extracting of the decret, for payment of it.

*Pactum
legis com-
missoriae.*

Infest-
ment of
rent.

13. Taking of annualrent having been discharged by the canon law, men did buy annualrents out of other mens lands, which was the origin of our present infestments of annualrent, and continues still frequent; by which, if men resolve not to rest on the personal security of the borrower, they take him also obliged to infest them in a yearly annualrent, payable out of his lands, correspondent to the sum lent; but if they exceed the ordinary annualrent allowed by law, it will infer usury: and so they have a double security, one personal against the borrow-

er

er for payment, and another real against the ground, it being *debitum fundi*, for which they may poind any part of the ground; as also, they have good action against the intromitters with the duties of the lands out of which their annualrents are payable, though they cannot poind or exact from the tenants any more than they owe to their master*, if the tenants compear, and instruct what they were owing the time they got the citation, by producing the master's discharges.

* Parl.
1469.
c. 36.

14. These annualrents require a special *fasine*, like wadsets and other real rights; the symbols whereof, if the annualrent be payable in money, is a penny of money; but if it be payable in victual, it is a parcel of victual.

15. This is singular in infeftments of annualrent, that apprisings thereupon will be preferred to all prior apprisings, *quoad* the bygones of the annualrent, if the infeftment of annualrent was prior to those apprisings, to which the apprising will be drawn back, and preferred to any intervening right; which privilege is contained

tained in the late act of parliament concerning debtor and creditor *.

* Parl.
1661.
c. 62.
sect. 9.

16. These infeftments of annualrent, being properly granted for security of sums, are extinguished not only by resignations, but by renunciations, and even by intromission with as much as might pay the principal sum; which intromission is probable by witnesses, whether the rent be victual or money; and therefore singular successors, buying infeftments of annualrent, are not secure by any register, but must rest on the warrandice of the seller.

Infeft-
ment of
relief.

17. Infeftments of relief are these which are granted by a debtor to his cautioner, for security of sums he stands bound for on his account, upon which the cautioner cannot enter to possession till he be distressed: and when the sum is paid, the right becomes absolutely null, as being but a temporary right; and so the debtor who granted the right needs not be of new infeft, but his former right revives.

TITLE

TITLE IX.

OF SERVITUDES.

1. **T**HE nature and constitution of property and real rights being explained in the foregoing titles, we shall now treat briefly of servitudes, which are *burdens affecting property and rights.*

2. Servitudes are either real or personal.

Servi-
tudes real
and per-
sonal.

3. Real servitudes are *whereby one man's property or ground is affected with some burden, for the use and behoof of another man's ground directly; and indirectly for the proprietor's use, as having right to that ground: which are divided into rural servitudes, and urban or city servitudes.*

4. Rural servitudes are *iter, which is a power of going through our neighbour's lands; actus is a power of driving carts or wains; via is the privilege of having high-ways in our neighbour's ground; and aquæ-ductus, which is a power and privilege*

Rural
servi-
tudes.
Iter.
Actus.
Via.

lege to draw water alongst their ground for watering of our own. And thus, *via* includes *iter* and *actus* as the lesser servitudes: so he that has a *via* has also power to drive carts and wains, and to walk himself through the ground burdened with the servitude, and of drawing stones and timber through the ground of the servient tenement.

City servitudes.

5. The city servitudes, called *servitutes urbanæ*, are chiefly five.

Oneris ferendi.

6. The first is *oneris ferendi*, which is a privilege, whereby one who has a house in the city can force the proprietor who has a house below his, to bear the burden of his house: and he may force the owner of the servient tenement to repair it, and make it fit for supporting the dominant tenement, contrary to the common nature of servitudes.

Tigni immittendi.

7. 2do, *Tigni immittendi*, which is the privilege of forcing our neighbour to receive into his house the joists of ours.

Stillicidii.

8. 3tio, *Stillicidii vel fluminis*, which is whereby our neighbour is obliged to receive the drops which fall from our house: under

der which is likewise comprehended the privilege of carrying away our water by sinks and chanel's.

9. 4to, *Non officiendi luminibus, whereby he can do nothing that can prejudice our lights.*

Non officiendi luminibus.

10. 5to, *Altius non tollendi, whereby our neighbour cannot raise his house higher, to prejudice the lights of the dominant tenement; which he may otherwise freely do, if he be not restrained by this servitude.*

Altius non tollendi.

11. By our law servitudes may be constituted without any saine, because they are incorporeal rights. But though servitudes merely established by writ be sufficient against the granter, yet they are not valid against singular successors, except that right be clothed with possession, which compleats the servitude, and makes it a real right: and they may be likewise established by prescription, without any writ, from him who has the servient tenement; though he who is to acquire the servitude by prescription, must have a real right

right in his person of the lands to which he prescribes the servitude.

12. The ordinary servitudes superadded by us to these of the Civil Law, are the servitudes of casting seal and divot, common pasturage and multures.

Common
pastu-
rage.

13. Common pasturage is a right of *pasturing the goods and cattle of the dominant tenement, upon the ground of the servient*; which is constituted frequently by a charter containing the clause of common pasturage, and sometimes by a personal obligation clothed with possession. But albeit it be indefinite, yet it can reach no further than to the proportion of goods effecting to the rent of the dominant tenement, and which they may keep and fodder in winter; which is done by sowing and rowming, that is to say, the determining the proportion of goods belonging to each dominant tenement, by assigning them particular rowms according to their respective rents.

Sow-
ing and
rowm-
ing.

14. Common pasturage in our law does ordinarily comprehend all the lesser servitudes, such as the casting of seal and di-

vots,

vots, presumptively only; for the one may be possessed without the other; nor will common pasturage infer a servitude of casting of seal and divots, if he who possessed the common pasturage was interrupted as to the casting of seal and divot.

15. Thirlage is *that servitude whereby the lands of one heritor are to pay some duty to the mill of another.*

Thirlage

16. Mills are *inter regalia*, and require therefore a special sasine, the symbols whereof are clap and happer. But if the mill be in a barony, *transit cum universitate.*

Mills.

17. Mills are ordinarily disposed with multures and sequels. The multures are *a quantity of corn payable to the heritor of the mill for grinding*: the knaveship, loke and bannock, are *a small quantity payable to the servants for their pains.*

Mul-
tures.

18. These quantities that are paid by those that are thirled are called insucken multures; and those quantities that are paid by such as come voluntarily are called outsucken multures.

Insucken
and out-
sucken
multures,

M

19. Thir-

19. Thirlages are constituted by writ, or by prescription.

20. The ways of constituting thirlage by writ are these :

21. 1st, When a master thirles his own tenants to his own mill, in which case ordinarily he diminishes the rent of his land, in contemplation of what they are to pay to the mill for grinding their corns; which he does by an act of his own court.

22. 2^{do}, When a heritor sells his lands to be holden of himself, and thirles his vassal to his mill : in which case he sells so much the cheaper ; and so the multures are just.

23. 3^{tio}, When the heritor of a mill disposes his mill, with the multures of his own lands : in which case the multures are also just, because he gets so much the more for his mill : and so this servitude is not so odious as it is believed to be.

24. 4^{to}, If a man disposes the mill of a barony *cum multuris*, or *cum astrictis multuris*; in either of these cases, he thereby astricts his whole barony, though not formerly

formerly astricted. But if he dispoſe the mill of the barony *cum multuris ſolitis & conſuetis*, he is thereby underſtood to have thirled only what was formerly thirled.

25. If the thirlage bears *omnia grana creſcentia*, all the corn growing upon the land will be thirled, with deduction only of ſeed, and horſe corn, and the farm, except it be carried to another mill; for it is preſumed farms muſt be ſold.

26. 3to, When *inveſta & illata* are thirled, all corns which thole fire and water within the aſtriction muſt pay mul- ture, though they come not to the mill. And tholing fire and water in this aſtric- tion is ſo interpreted as to extend only to corns that are ſteeped and kilned.

27. The way of conſtituting thirlage by preſcription is immemorial, or forty years poſſeſſion, by virtue of ſome title, ſuch as a decreet, though in abſence, and even when the maſter is not called: and any act of a baron court, though made on- ly by a baillie, without a ſpecial warrant from the heritor, is a ſufficient title for preſcription. And though the coming to

Dry
mul-
tures.

a mill past all memory, does not astrict the comers for the future; it being a general rule in all servitudes, that *ea quæ sunt meræ facultatis non præscribuntur*; yet in mills of the king's property, immemorial possession constitutes a thirlage. And if men likewise pay dry multures, that is to say, such a quantity, whether they come to grind or not, for forty years, they will be thereby astricted; for it is not presumeable they would have paid dry multure for so long a time, except they had been thirled.

28. If the quantity to be paid be not determined in writ, it is regulated by the use of payment for forty years.

29. Those who are thirled are also obliged to maintain the mill, mill-dams, water-gangs, and to bring home its mill-stones.

30. If such as are thirled bring not their corns, they are pursued by an action called abstracted multures.

31. There are two rules to be observed in all servitudes.

32. 1^{mo},

32. 1^{mo}, *Res sua nemini servit*, no man can have a servitude on what is his own: and therefore if the land on which we have a servitude become ours, the servitude is extinguished.

33. 2^{do}, When we have a servitude on any other land, this servitude affects every foot of that land, *unaquæque gleba servit*: but this is to be taken *civiliter & non judaice*; so that it must be reasonably used. And thus, if we feu out some acres, with privilege to the feuer to cast seal and divot upon our moor for maintaining his houses; though in strict law every part of the moor is affected with the servitude, yet the lords will allow any man to till and sow his own moor, leaving such a proportion as may maintain these houses.

34. Personal servitudes are *whereby one man's property is affected with some burden tending directly to the utility and profit of another man*: and by the Civil Law are divided into *usufruct*. use and habitation.

Personal
servi-
tudes.

35. *Usus fructus* is called *liferent* in our law; which is *a right to use and dis-*

pose upon any thing during life, the substance thereof being preserved.

36. Use and habitation were restricted to the naked use of the liferenter, whereby his power of disposing and making profit of the thing liferented was restrained, and are not in use with us.

Liferents
and their
division.

37. Liferents are either constituted by paction, or by law. Liferents by paction are either by reservation, as when a fief denudes himself of the fee in favour of another, reserving his own liferent: or by a new constitution, as when the fief disposes his lands to another, during all the days of his life. The first needs no investiture, but the second does, else it is not valid against singular successors: but the liferenter being invested, transmits his right to any, by assignation, without investiture; for it being a servitude and a personal right, it neither needs nor can admit of a subaltern investiture.

38. A liferenter also, by reservation, may enter the heirs of vassals, (though he cannot receive singular successors) if he was himself invested, but another liferenter cannot;

cannot; and even a liferenter by reservation cannot enter those vassals, if he was not once infeft, because he cannot transmit a right which he has not.

39. When more persons are jointly infeft, they are called conjunct fiars: but though a wife be a conjunct fiar, yet her fee lasts but during her life; and during her life she may enter vassals, and has right also to all the casualties, as other fiars.

Conjunct
fiars.

40. Liferents by law are the terce and the courtesy.

Liferents
by law.

41. The terce is *a liferent of the third of all the tenements wherein the husband died infeft, provided by law to a wife*: which is explained before, title *marriage*. Which terce is constituted by an inquest, who upon a brieve out of the chancery, directed to the sheriff, or other judge ordinary, do serve her to a terce: upon which service the judge to whom the brieve was directed, without retouring it, divides the land betwixt the heir and relict, and expresses the marches in an instrument; and this is called to ken her to her

her terce, the marches being kened by the instrument. And though the service gives her right to the third of the mails and duties, yet she cannot remove tenants thereby, till she be kened to her terce, or the same be otherwise divided; because before division, she bruiketh the terce *pro indiviso* with the proprietor.

Briefes.

42. This brieve contains two points; 1st, That the bearer was lawful wife to the defunct; and, 2^{do}, That he died in-
fest in such tenements. But if the relict was holden and reputed lawful wife in her husband's life, no exception in the contrary will stop the service*.

* Parl.
1503.
c. 77.

43. There is no terce in burgage lands, feu-duties, or other casualities of the superiority, nor in reversions, tacks nor patronages.

Courtesy.

44. The courtesy is a *liferent* granted by law to him who married an heretrix, of all her heritage, and of that only. It needs neither sasine nor other solemnity to its constitution, but is *ipso jure* continued to him, if there were children procreated of the

the marriage who were heard to cry, tho' the marriage dissolve within year and day.

45. All these liferenters are obliged to find caution to preserve the thing life-rented, and to leave it in as good condition as they found it, which is called *cautio usufructuaria*; and they are also bound to aliment the apparent heir, if he have not *aliunde* to aliment himself *.

Cautio usufructuaria.

* Parl.
1491.
c. 25.

46. The legal terms of all liferents are Whitsunday and Martinmas. And therefore, if a liferenter survive Whitsunday, or die upon the Whitsunday in the afternoon, her executors have right to the half of the liferent duties for that year, whether they be payable in victual or monies: and if she survive Martinmas, or die upon Martinmas day in the afternoon, her executors have right to the liferent duties of that whole year, and that whether it be land rent, or the rent of a mill, albeit the conventional terms were after Martinmas. But if liferenters labour the lands themselves, their executors will have right to the whole rent thereof, at whatever time their death happen.

T I T L E

TITLE X.

Of TEINDS.

Tiends.

1. **T**EINDS being a burden affecting lands, fall in to be considered in this place.

2. Teinds are defined to be *that special and liquid proportion or quota of our goods and rents lawfully acquired, that is due to GOD, for maintaining his service.*

3. It seems our law has followed the opinion of those divines who think that some proportion of our goods is due by divine right, for we say that teinds are the spirituality of the church's revenue; but that the proportion is not *juris divini*, for we alter the proportion by special laws and customs, though for distinction's sake we call this proportion the tenth.

4. By the Canon Law they are divided into personal teinds, which arise out of the personal gain and profits that a man has by his trade or personal industry; predial teinds, which arise from the natural product

Personal
teinds.Predial
teinds.

product of the land that men possess; and mixed teinds, which arise from the profits that men by their personal industry make out of their lands,

5. They are likewise divided into parsonage teinds, which are due to the parson; and vicarage teinds, which are due to the vicar: and, regularly, all teinds are due to the incumbent who serves the cure; so that if the incumbent be a parson, he has right to the parsonage teinds; and if he be a vicar, he has right to the vicarage teinds.

Parsonage and vicarage teinds.

6. The teinds of corn are called parsonage teinds, or *decimæ garbales*; and the fifth boll of the free rent is still teind with us. And all land must pay teind, except they be such as have been feued out of old by churchmen, before the Lateran council, (by which they were prohibited to alienate the teinds) and who had right both to stock and teind, and where the teinds were never known to have been separated from the stock.

7. Some monks likewise got particular exemptions from paying teinds for these lands

lands which they themselves did bring in and cultivate. And with us, the privilege granted to temple lands, which belonged of old to the knights of St John, a religious order, and to the monks of the Cistercian order, are continued to those who have right to their lands, with that exemption. Manfes and glebes are likewise free from payment of teinds.

3. Vicarage teinds are called the small teinds with us, because they are payable out of inconsiderable things, such as lambs, wool, cheese, eggs, &c. and they are said to be local, because they are paid according to the custom of the place; so that in the same parishes some heritors will be liable for vicarage teinds of different kinds. For though no man can prescribe a liberty from payment of parsonage teinds since the Lateran council, yet, as forty years possession is a sufficient right to a minister for vicarage teinds, and as it does determine the quota, as well as the species of vicarage teinds; so by forty years freedom, the heritor is secure in all time

time coming from payment of vicarage teinds.

9. When Popery was suppressed, all the lands belonging to monks and others were annexed to the crown in *an. 1587* *; but the teinds belonging to them were not annexed, these being acknowledged by our law to be the patrimony of the church; and they are therefore called the spirituality of the benefices.

* Parl.
1587.
c. 29.

10. The monasteries of old having got several parish churches mortified to them, whereby they had right to their parsonage teinds, such as got those monasteries erected in their favour became thereby to have right to other men's teinds. And great emulation, as well as prejudice, arising from men's not having right to lead their own tiends,

11. King Charles I. did therefore prevail with all the said titulars of erection, to submit what should be paid them as the price of the saids teinds: and his majesty did determine, that the rate of all tiends should be the fifth part of the constant rent, where the stock and tiend were

N

accustomed

accustomed to be set jointly ; but where the teinds were set separately from the stock, the heritor did in the valuation get down a fifth part of what was proven and valued to be the rate of the teinds ; and which deduction is called the king's ease, because it was given by him in his decreet-arbitral. It was also ordained, that the saids teinds being valued, should be bought at nine years purchase *.

* Parl.
1633.
c. 17, 19.
Parl.
1661.
c. 61.

Valua-
tion of
teinds.

12. For effectuating this determination, the parliament 1633 appointed some of their own number to value the said tiends ; and after a process for valuation is raised before these commissioners, in which the titular, his tacksman, and the minister are to be cited, the heritor in the mean time gets the leading of his own teinds.

13. The probation is oft-times allowed to both parties in this court ; and where one party is preferred, it is called the prerogative of probation, and is much contended for ; and is thus regulated, viz. Either the tiends are drawn *ipsa corpora* by the titular or tacksman, and then they have

have the sole probation allowed them, to prove what the teinds were worth (they proving that they led seven years of fifteen before 1628): or else they have rental bolls paid them; & *eo casu* they have the sole probation likewise, they proving 20 years possession of uplifting rental bolls, condescending upon quantity and quality: or, 3^{tio}, the heritors have tacks of their own tiends, for payment of silver duty; and then there is a joint probation allowed both to heritor and titular.

14. Ecclesiastic persons, such as bishops, parsons, &c. submitted only what they were not in possession of; and therefore there can be no valuation led of any tiends; parsonage or vicarage, which they were actually in possession of. But by a letter from his majesty, thereafter, in *anno* 1634, it is declared, that "if their teinds be set to tacksmen, they may be valued during the tack; whereas the teinds they were in the natural possession of, cannot: though tiends holden of collegiate kirks may be valued, and so may be bought and sold."

15. The burrows are only decerned to sell the superplus of the teinds they had right to, over and above what will be due for the entertainment of their ministers, colleges, schools and hospitals.

16. After the teinds are valued, and the titular decerned to sell, or if the titular be willing to sell without a decret, the heritor is infeft and seased by the titular, who, in the disposition or charter, reserves to himself relief of the king's annuity, and of all impositions laid or to be laid upon teinds, and warrants only from his own and his predecessors facts and deeds: and, on the other hand, the heritor who has got a decret of valuation only, and not of vendition, is obliged to infeft the titular, for security of the valued bolls.

17. By the foresaid decret-arbitral, the several parish kirks were to be provided; and therefore the titular might allocate any one heritor's teinds for provision of the minister, which renders the privilege of buying very ineffectual to the heritors; whereas it had been much better, that the stipend had been proportionably laid upon all the heritors.

18. Tiends

Burdens
affecting
teinds.

18. Teinds are not *debita fundi*, and so singular successors are not liable in them: but yet the minister has so far a tacit hypothecque, that he may exact his modified stipend from any of the heritors, as far as his teinds will extend, reserving relief to that distressed heritor; and if the heritor sell his crop, the merchant who buys the same will be liable, but tenants will not be liable, if they pay a joint duty to their master both for stock and tiend.

19. When the tack of teinds expires, the titular needs not use a warning against the tacksman, as in lands; but he raises and executes an inhibition against the tacksman, which interrupts tacit relocation for that, and all the subsequent years, after which the intrometters are liable in a spuilzie.

Inhibition upon teinds.

20. The parliament 1633 did, after the said submissions and decret-arbitral, grant to his majesty an annuity out of all teinds, except those paid to bishops, and other pious uses, viz. ten shilling out of every boll of teind wheat; out of the boll of the best teind bear, eight shilling; out of oats,

Annuities of teinds.

pease and rye, six shilling, where the boll of these grains did yield a boll of meal; and, where the rent consists of money, six merks out of every hundred. And this annuity is *debitum fundi*; but not being annexed to the crown, it may be, and is ordinarily, bought by the heritors from his majesty's treasurer, or others having right from the king.

T I T L E X I.

Of Inhibitions.

1. **P**roperty and real rights, with the burdens affecting the same, being explained; it is fit now to treat of legal diligences, by which these rights may be evicted, or the free use and disposal thereof restrained: which diligences are chiefly three, inhibition, comprising and adjudication.

Inhibition.

2. Inhibition is a *personal prohibition*, by letters under the signet, discharging the party inhibited to sell, dilapidate, or put away any of his lands, in prejudice of
the

the debt due to the raiser of the inhibition.

The ground and warrant thereof is a decret, or a registrate bond, (which in the construction of law is a decret) either decerning or obliging the debtor to pay or perform the sums or deeds therein specified; or a depending process. And if these inhibitions be not raised upon legal and relevant grounds, they may be reduced.

Ground
thereof.

3. Inhibitions reach only heritage, but not moveables, though the stile thereof runs equally against both: and moveable bonds can only be reduced, in so far as they may be the foundation of real diligences to affect heritage, reserving still personal execution against the granter; and they extend only to posterior voluntary rights granted after inhibition, but not to apprisings or adjudications, though led posterior to the inhibition, if the ground thereof was anterior: neither do they extend to posterior dispositions and investments depending upon prior obligations, either general or particular, for granting of these rights; nor to renunciations

Extent
thereof.

ciations of temporal rights, albeit posterior to the inhibition, these being necessary upon payment.

† Act of
federunt,
19. Feb.
1680.

4. By a late act of federunt †, if the creditor intimate by way of instrument to the person having the right of reversion, that the wadsetter or annualrenter stands inhibited at his instance, and does produce, in presence of the parties and notary, the inhibition duly registrated; the lords will not sustain renunciations or grants of redemption, although upon true payment, unless there be a declarator of redemption obtained, to which the inhibitor must be cited.

Manner
of execu-
ting inhi-
bitions.

5. The way of executing inhibitions is, that the same must be by a messenger against the person inhibited, personally, or at his dwelling place, and at the market cross of the head burgh of the shire, stewartry or regality where the person inhibited dwells*; and after crying of three several Oyeses, and public reading of the letters, the whole lieges are discharged to purchase any lands or heritages from the person inhibited; and the messenger leaves

* Parl.
1597.
c. 268,
269.
Parl.
1600.
c. 13,

or

or affixes a copy of the letters at the market cross; all which must be written in a paper, and subscribed by the messenger and by two witnesses †; which writ is called the execution of inhibition: and thereafter the letters and execution thereof must be registrated within forty days after the execution thereof, either in the general register at Edinburgh, or in the particular register of the jurisdiction where the person inhibited dwells, or the major part of the lands ly *. And if any of these acts be omitted, the inhibition is null, these being *de solennitatibus instrumenti*.

† Parl.
1681.
c. 5.

* Parl,
1581.
c. 119.
n. 1.

T I T L E XII.

Of comprisings and adjudications.

1. **T**HE fee being thus settled in the vassal, it may be either taken from him, and evicted for his debt, or his crimes: The first is by apprising and adjudication, and the last by confiscation and forfeiture.

2. Apprising

Appri-
sing.

† Parl.
1469.
c. 36.

2. Apprising proceeds by letters charging the debtor to compear before a messenger, (who is by the letters made judge, and sheriff in that part, in place of the sheriff of the shire, whose office properly it is †) and to hear the lands specified in the letters, apprised by an inquest of 15 sworn men, and declared to belong to the creditor for payment of his debt. But because our law thought it not just that a man's lands should be taken from him, whilst his moveables could pay his debt, therefore, in the first place, the messenger who executes the letters, must declare that he searched for moveables, and because he could not find as many as would pay the debt, therefore he denounced the lands to be apprised on the ground of the lands, and at the market cross of the shire, stewartry or regality where the lands ly, and left copies both on the ground and at the cross.

3. At the day appointed by the letters, the messenger, who is made sheriff in that part, fences a court; and the debtor being called, his lands are offered to him for

for the money ; and if the money be not ready, the inquest finds that the debtor's lands should belong to the creditor for his payment ; and this is called a decret of comprising †, and the most part of the inquest affixes their seals thereto ; upon which the compriser gets a charter past in exchequer, and is infest by precepts out of the chancellary, if the lands hold of the king. And though of old, land apprised was proportioned to the money, yet thereafter, whatever land was sought to be apprised was accordingly apprised, though far exceeding the sum in value, because seven years was given (which was thereafter prorogated to ten ‡) for redeeming the land by payment of the true sum : and this is called a legal reversion, because the law gives it to the debtor ; and if it be not redeemed within that time, the land belongs to himself for ever. But that legal runs not against minors, because they want judgment to know their hazard ; so that they may redeem at any time before they be twenty five years compleat :

Decreet
of com-
prising.

‡ Parl.
1661.
c. 62.
sect. 7.

Legal re-
version.

compleat: but if the comprising expire during their minority, the compriser will thereafter have right to the whole mails and duties, albeit exceeding his annualrent. But that part of the act is altered by a posterior statute, and the appriser is restricted to his annualrent during the minority of the debtor †.

† Parl.
1663.
c. 10.

4. If a minor succeed to a minor whose lands are apprifed, he has right to redeem, as if the comprising had been led against himself: but if a major succeed to a minor, after the legal is expired, he hath only year and day to redeem; and if the seven years be unexpired in the minor's time, the major may redeem within these years that are not run: and if the rent of the lands be not correspondent to the annualrent of the money, whoever has right to the reversion, whether major or minor, must satisfy the whole sums and annualrents resting, before he can redeem †. But the compriser, during the legal, is restricted to the annualrent of the sums due to him; and the superplus of the intromission will be imputed in payment

† Parl.
1621.
c. 6.

ment of his principal sum : and if he be paid by intromission, within the legal, of his whole principal sum, bygone annualrents and expences, with the composition paid to the superior, the comprising expires *ipso facto* *.

5. Though the superior be not regularly obliged to receive a singular successor, yet lest, by collusion betwixt the debtor and his superior, the true creditor should be unpaid, therefore by a special act of parliament, the superior is forced to receive a comprising, upon payment of a full year's duty of the land †; and he gets no more from all, though many comprisingers charge him to receive them : but, if the superior pleases, he may retain the land to himself, he paying the debt.

6. The first comprising, without sasine, carries right to all tacks, reversions, and other rights which require no infeftment; and all posterior comprisingings need not infeftment, because they carry only the right of reversion. But yet, ordinarily, second apprisers do infeft themselves, because the first may be null, or become paid, or the

* Parl.
1621.
c. 6.

† Parl.
1469.
c. 36.
Parl.
1621.
c. 6.

first compriser may ly out from seeking mails and duties, or the second comprisers would remove tenants, which none can pursue without being infest; but the superior comprising needs no infestment.

7. After denunciation of the lands to be apprifed, the debtor can do no voluntary deed by disposing or resigning, (because else he might frustrate the diligence) except he was before denunciation specially obliged to dispoise or resign.

Preference
amongst
apprisers.

8. In a competition amongst apprifers, the first infestment or charge against the superior is also preferred. And if the first compriser did diligence to be infest, but was stopt by collusion, as if the superior, to gratify the second compriser, should unjustly suspend the first; albeit the second apprifiser be first infest, yet the first apprifiser having done diligence, by charging the superior, will be preferred to the second apprifiser first infest.

9. The compriser, during the years of the legal, is not obliged to enter to the possession; but if he once enter, he must be accountable for the mails and duties, though

though he leave off to possess. But if the meanest part of the sum be unpaid after the expiring of the legal, the whole land comprised belongs to the compriser, without consideration of what he has intromitted with: to prevent which, the debtor, or a second, or any posterior compriser, who has comprised the right of reversion, does, before the legal expire, require the compriser to compear at any day or place, to receive his money, in so far as he is not paid by his intromission: and having consigned the same accordingly at that day, he raises an action of compt and reckoning before the lords of session; and if it be found that he is paid by intromission, and the money consigned, the lords decern the comprising to be paid and extinct; nor needs the debtor get new satisfaction, for the former right revives, since the fee was still in his person, upon condition that he would pay the sum within the legal.

10. In this compt and reckoning, the compriser will get allowance of the sheriff fee, which is the twentieth penny of the sum

Sheriff
fee.

sum that was comprised for, and of the entry payable to the superior, though the appriser truly paid neither: but he will not get payment of a factor's fee for taking up the rent, except he really paid it.

11. All apprisings led since the 1st of January 1652, within year and day of the first effectual comprising by infestment, or charge against the superior, come in *pari passu*, as if they were all contained in one apprising *. But the posterior apprisings within year and day must pay their proportion of the expences of the infestment and composition given to the superior by the first appriser.

* Parl.
1661.
c. 62.
sect. 9.

12. Because apparent heirs did frequently acquire rights to expired apprisings against their predecessors, by which they bruiked their estates without paying their debt, to the ruin of lawful creditors, therefore our law * did very justly ordain all such apprisings to be redeemed for the sums truly paid out by the apparent heir; which proceeds, albeit the apparent heir acquire these rights in his predecessor's lifetime. But if the expired apprising was acquired

* Parl.
1661.
c. 62.
sect. 10.

acquired *gratis* by the apparent heir, the same is only redeemable by the creditors for the sums contained in the apprising.

13. Because the parliament thought it exorbitant to take the greatest estates for the smallest sums, and to make a messenger judge in affairs of so great importance, therefore in *anno* 1672 this way of comprising was altered, and in place thereof the creditor now gets lands adjudged to him by the lords of session proportionally to the sums due to him, (with a fifth part more) besides the composition due to the superior, and expences for obtaining infeftment, because the creditor is obliged to take land for his money. Which adjudication, coming in place of comprising, is perfected by charter and sasine, as comprising; and the superior is obliged to receive the adjudger*: but it is redeemable only within five years by majors.

Adjudi-
cation.

* Parl.
1669.
c. 18.

14. If the debtor compear not to concur for compleating the adjudger's right, by giving him a progress and transumps of the evidence, and ratifying the decret

of adjudication; then the whole lands can be adjudged, as they were formerly apprifed, (nor in that case can the adjudication contain a fifth part more) it being unreasonable to force a man to take proportional lands for his money, and yet to be unsecured even for that proportion. And they are redeemable within ten years, (these adjudications being now come in the place of apprisings) and have the same privileges and restrictions which comprisings had, by the act of parliament made concerning debtor and creditor, in anno 1661. But if the creditor attain possession upon his comprising or adjudication, he can use no further execution against the debtor, except the lands be evicted *.

* Parl.

1672.

c. 19.

Adjudi-
cations
after the
old form.

15. There are other two kinds of adjudication allowed by our law: the first is, when the apparent heir of the debtor is charged to enter heir, and renounces to be heir; the creditor having obtained a decret *cognitionis causa*, for constituting the debt, wherein the apparent heir is only pursued for formality: but the decret can have no effect personally against him; in

in which case the *hereditas jacens* will be adjudged to the creditor for payment of the debt due by the defunct; which, if it be liquid, and instantly instructed, the pursuer in the same process protesting for adjudication, the same will be allowed to him summarily, without necessity of any other decret *cognitionis causa*.

16. These adjudications are redeemable within seven years, at the instance of co-creditors, one after another, who have likewise obtained decreets of adjudication: and a minor renouncing to be heir may be reponed, and allowed to redeem, upon payment *: but majors renouncing have not that privilege directly, it being only by act of parliament granted to minors, or to co-creditors, likewise adjudgers.

17. And if the superior be charged to insert the adjudger, he will get a year's rent for composition, as in comprisings †.

18. Adjudications carry right to all which would have fallen to the heir, as all heritable rights: and the whole bygone rents and duties since the defunct's death may

Legal re-
ver. of
adjud.

* Parl.
1621.
c. 7.

† Parl.
1669.
c. 18.

may be adjudged, because these belonged to the heir.

19. There is another kind of adjudication competent by our law, that is, for performing any obligation which consists *in facto*, and relates to particular dispositions and obligations to infest: and after diligence used by decret and registered horning against the disponer or his heir, for making the same effectual, the lords will adjudge the lands disposed to belong to the pursuer, as a *remedium extraordinarium*, there being no other remedy competent.

20. This adjudication extends no farther than to the thing disposed, and hath no reversion.

21. If the common debtor become bankrupt, and that there are real diligences affecting his estate, then the creditors may raise an action of sale before the lords, and get the estate roup'd †, and, according to their diligences, the price divided amongst them, effecting to their sums.

22. In this process, the lords first determine what shall be the lowest price, and

† Parl.
1681.
c. 17.

and then, they name one of their number before whom the roup is to be made ; and if none offer more, the raifer of the action is preferred, and the lands are disposed by that lord, and the disposition runs in his name.

23. Confiscation will be handled in the title of crimes.

Confiscation.



THE

THE
INSTITUTIONS
OF THE
LAW of SCOTLAND.

BOOK THIRD.

TITLE I.

Of obligations and contracts in general.

1. **H**AVING thus cleared real rights,
we will now proceed to treat of
obligations and personal rights.

Obliga-
tions.

2. An obligation is defined to be *that
legal tie whereby we are bound to pay or
perform any thing.*

Division
of obli-
gations.

3. The chief division of obligations by
the Civil Law and ours is, that some are
natural, because they arise from the prin-
ciples of right reason, or laws of nature;
some

some civil, because they arise from positive laws, or municipal customs.

4. Another considerable division of obligations is, that some arise from contracts, some from deeds resembling contracts, some from malefices, and some from deeds which resemble malefices, *ex contractu, aut quasi contractu; ex maleficio, aut quasi maleficio*: for we become equally tied and obliged to men, either by contracting expressly with them, or by doing some deed which induces an obligation, without an express paction, or by committing malefices against them.

Another
division
of obli-
gations.

5. A contract is *an agreement entered into by several persons, inducing an obligation by its own nature*: and the obligations arising from contracts are divided and distinguished, according as they are perfected either by the sole consent of the contracters, or by the intervention or tradition of things, or, lastly, by word or writ: hence is that remarkable division of contracts in the Civil Law, *qui re, verbis, literis, aut consensu perficiuntur*.

Con-
tracts.

6. The

Real con-
tracts.

6. The contracts which depend upon things are these which arise either from borrowing, (which comprehends *indebite solutum*) or from loan, or from depositation, or from impignoration; and are called *mutuum, commodatum, depositum & pignus*.

Mutuum.

7. Borrowing or *mutuum* is that contract, whereby a man getting any thing from another, is obliged to restore him, not the same thing that was borrowed, but the equivalent, or as much of the same quality in measure, number and weight. As when one borrows a thousand pounds, the receiver obliges himself to restore not the same, but another thousand pounds; and therefore, the property of the thing borrowed being transferred from the giver to the receiver, the receiver runs the hazard of all the loss that the thing borrowed can sustain after it is delivered. This contract is most strictly interpreted, so that nothing is understood but what is clearly expressed.

*Commo-
datum.*

8. Loan or *commodatum* is that contract, whereby a man gets the loan of any particular

ticular thing, gratis, for some special use, and obliges him to restore the same in specie, and not the equivalent; as when a man gets the loan of a horse or coach. And because in this case, the property remains with the lender, therefore if the thing lent be lost, or perish by chance, the loss redounds to the lender, for the thing is still his. But if the thing be lent merely for the advantage of the borrower, he is liable to do most exact diligence; and therefore, if the thing perish or sustain any prejudice for want of exact diligence, the borrower must make up the same. But if the thing was lent for both the borrower and the lender's advantage, then from the same principle of natural equity, the borrower is only obliged to do such diligence, and to be so careful of the thing borrowed, as he would have been of his own.

9. In this contract, the receiver is obliged to restore the same species in as good condition as he got it; and the lender is obliged to pay the receiver any considerable expences that he necessarily bestowed

ed upon the thing borrowed, the law not allowing inconsiderable expences, because the borrower has the use of the thing which should compensate these.

Precarium.

10. *Precarium* is, when any thing is lent, to be called back at the lender's pleasure; wherein it differs from *commodatum*, which imports always a determinate time for making use of the thing lent.

Deposition.

11. *Deposition* is that contract which is entered into by one man's delivering any thing into the custody of another, to be kept *gratis* for his use. And therefore, because in this contract the property remains with him who did depositate the thing, if it be lost, it is lost to him. And since depositions are made for the behoof of him who does depositate, therefore the depositar (for so we call him in whose hand the thing is depositated) is only liable if the thing depositated was lost by the depositar's dole, or gross fault; *nam depositarius tantum præstat dolum & latam culpam*. But inn-keepers, stablers and masters of ships, are liable to most exact diligence in preserving the goods of travellers

*Nauta,
caupones,
stab. &c.*

travellers and passengers, which they bring into their houses and ships, and to repair and make up all the loss they may sustain while they are in the inns or ships, whether the prejudice come by the servants or mariners, or by strangers: which special kind of depositation is introduced by equity, contrary to the common rules of depositation, and which we have immediately from the Civil Law, and *edictum prætoris*, intituled *Nautæ, caupones, stabularii, &c.*

12. As in this contract, the depositar is liable to restore the same thing that is deposited, and not the equivalent; so he who depositates is obliged to pay the depositar what he bestowed upon it whilst it did ly beside him; for generally, a gratuitous office ought to prejudice no man: but he cannot crave compensation upon any debt due to him by the person who depositates; which is singular in this contract, for he must first answer his trust.

13. Pledge is the contract, *whereby one man gives to another any thing, for the receiver's security of what he owes him, to*

Pledge

be delivered upon payment: and therefore, because the thing itself in specie is to be redelivered, if it perish during the impignoration, without the gross fault or fraud of him who receives the pledge, it perishes to the impignorator. And because impignurations are made for the advantage of the giver and receiver, (the one being concerned to get money or some such thing upon the pledge, and the other to get a pledge for security of his money) therefore he who receives the pledge is liable to do such diligence for preserving thereof, as prudent men use to do in their own affairs. But he is not liable for *culpa levissima*, the contract being for the behoof of both parties: and he will have repetition from him, for what he profitably bestowed upon it during the impignoration.

14. Sometimes what is impignorated is not delivered, and then the pledge is called an hypothecue; and the law sometimes makes such tacit hypothecues, without express paction, as where it makes the corn growing upon land, or the goods brought

Hypo-
thecue.

brought in to the house, to be liable to the heritor for payment of his rent.

15. If one man pays to another more than is due to him, or what is not due at all, the law* allows to him repetition of what was unjustly paid; and this is called *solutio indebiti*, because by paying to you, I oblige you really and in effect to repay what shall be found not to be due, or to have been paid, more than was really due. But since this obligation arises from the payer's ignorance, therefore, if he knew that what he paid was not due, he will not get repetition, but what he paid will be looked upon as a donation; but it must be *ignorantia facti*, for *ignorantia juris* availleth no man. And since this repayment is only allowed by the principles of natural equity, therefore if what was paid was due in equity, though it was not due by positive law, the payer will not get repetition.

*Solutio
indebiti.*

TITLE II.

Of obligations by word or writ.

Obliga-
tion by
writ.

1. **S**OME obligations require writ to make them binding, whereas others require writ only by way of probation, that is to say, cannot be proven without writ, though they be valid and binding without it.

2. All obligations for transmitting the real rights of lands, or others to be perfected by writ, do so far require writ of their own nature, that though the bargain be solemnly and clearly ended by verbal transaction, yet there is still place to refile, or *locus pœnitentiæ*, till the writ be signed.

Promises.

3. Though verbal promises do by our law bind the promiser, yet, because the position and import of words may be easily mistaken by the hearers, therefore verbal obligations or promises can only be proven by oath of party, and not by witnesses, though the sum be never so small.

4. Because

4. Because mens subscriptions may be easily counterfeited, therefore by an express statute with us, no writ of importance (which we interpret to be, when it is granted for more than L. 100.) is valid, except it be signed in presence of two subscribing witnesses, if the party can write; or by two notars and four witnesses, if the party cannot write*; except the writ be holograph, that is to say, all written with the granter's own hand, and that the writer and witnesses be specially designed†. And though the subscribing by two initial letters be sustained, where it is proved that the subscriber was in use so to subscribe, yet the granter's mark is not sufficient, except the verity of the affixing that mark be referred to the granter's oath. And if the sum, though exceeding L. 100. be restricted to L. 100. the obligation will be sustained, though it want witnesses.

5. Such is the favour of commerce, and such expedition it requires, that upon its account, bills of exchange are sustained, though they be not signed before witnesses; and delivery of goods, upon bargains,

* Parl.
1579.
c. 80.

† Parl.
1681.
c. 5.

Bills of
exchange

gains, are sustained to be proved by witnesses, though there be no writ; there being no writ used in such cases. And such is the favour of contracts of marriage, especially where they are become notour by subsequent marriage, that they are sustained, though there be no witnesses.

Delivery
of writs.

6. By our law, an obligation in writ is not binding, except it either be delivered, or dispense with the not delivery by a special clause therein, *nam traditione transferuntur rerum dominia*; but tradition is not requisite in mutual contracts, or where the granter has an interest to keep the paper himself, as where his life, or liberty to alter, is reserved. And if the writ be in his hand in whose favours it was made, it is presumed to have been delivered, and cannot be taken from him upon the pretence of not delivery, except it be referred to his oath, that it was never a delivered evident by the granter.

TITLE

TITLE III.

of obligations and contracts arising from consent, and accessory obligations.

I. **T**HOUGH all contracts require the consent of the contracters, yet there are four, viz. *emption, location, society and mandate*, which are said in a more special way to arise from consent, because these contracts are perfected by mere consent of parties, without any further solemnity or tradition. And thus, how soon two parties agree concerning the price of any thing that is to be sold, that contract is by mere consent so far perfected, that the buyer hath the seller precisely obliged to deliver the thing bought, and perfect the sale, albeit the *dominium* or property be not transferred, but remains with the seller until delivery. And if the thing bought perish without the seller's fault, even before delivery, the loss is the buyer's, in respect of the personal obligation upon the seller to deliver it, and the buyer's right

Contracts
perfected
by con-
sent.

*Em. &
vend.*

Earnest.

right is established, even before tradition; and though earnest or arles be given, as a symbol or mark of agreement, yet the consent, without the earnest or arles, (as we call it) compleats the bargain; and if the earnest be in current money, it is to be imputed as a part of the price.

2. In this contract of emption and vendition, there must be a price consisting in numerate and down told money; for if one thing be given for another, the law calls that contract permutation or excambion, and not emption and vendition; and this price must be certain and definite: and if the price be referred to another, the bargain will subsist, except that third party, to whom it was referred, either will not or cannot determine the price.

**Location
and con-
duction.**

3. Location and conduction is a contract, *whereby a hire is given for the use and profit of any thing, or for the work of persons.* It differeth from emption and vendition chiefly in this, that the design of the contract of emption is to transfer the property; but in location, the property remains with the fetter.

4. This

4. This contract being entered into by the mutual consent and for the advantage of both parties, the conductor is only liable to use and adhibite a moderate diligence for preserving the thing set, that is, such diligence as prudent men adhibite in their own affairs; so that if the same perish without his gross and supine negligence or fraud, he is not liable to make it up to the locator.

5. Location, or setting of lands for a certain hire called the tack-duty, is frequent in Scotland. And it is to be observed, that if the ground yield no increase, but is absolutely barren, without the fault of the conductor, the hire will not be due, since that was given for the profit and use of the ground. But if there be not an absolute sterility, and that the land yield some profit, though never so little, the hire will be due, if the profit but exceed the expence of the labouring.

6. From this contract there arise two actions; the one whereby the conductor is obliged to pay the hire agreed unto, and to restore the thing set after the end of the

Tack:
duty.

the location, in as good condition as he got it; the other is an action whereby the locator is bound to refund to the conductor the necessary expences employed upon the thing hired, during the location. *Vide sup.* Book II. Tit. 6. § 5, 6, 7, 8, 11.

Society.

7. Society is a contract, *whereby several persons oblige themselves to communicate loss and gain, arising from the things common in the society.*

8. All the partners in the society do, by the nature of this contract, share equally, except it be otherwise provided; and if either the share of the gain or loss be expressed, the one regulates still the other. But because some mens pains are of as great value as other mens money, therefore it is lawful, and consistent with the nature of society, to contract so as that one may have the half of the gain, and no loss: but the contract would be null, if it were provided that one should have all the gain and no loss; for there could be no compensation, though the other were never so skillful.

9. By

9. By this contract, all the partners are obliged to advance for the affairs of the society, according to the shares they have in it.

10. The society is extinguished, and the persons who entered therein loosed therefrom, by the death of any of the partners, or by their becoming insolvent, except it be otherwise provided; for this is a personal contract, wherein men respect the humour and industry of one another: and so this contract is dissolved by the simple renunciation of any of the partners; so that every one has a negative vote: and if the society be entered into with this condition, that it should not be dissolved at the option of any of the partners, the law does reprobate such pactions. And from the same principle likewise it is, that partners in a society are not liable for further diligence than they used to adhibite in their own affairs, having voluntarily chosen one another for partners; for it is presumed they are satisfied with one another's diligence, the contract be-

Ways of
dissoluti-
on of so-
ciety.

Q

ing

ing entered into for the behoof and profit of all the partners.

Mandate.

11. Mandate is that contract where *one employs another to do or manage any business gratuitously*. For if he who is employed get a reward, it is not properly a mandate, but *locatio operarum*, or a feeing of the person so employed. But yet, if the receiver of the mandate has been at any expence upon the account of the mandate, the employer must pay it.

12. He who receives the mandate is obliged to execute the same, according to the rules prescribed by the employer, and not to exceed the bounds of his mandate. And therefore, if Titius employed Seius to buy him such a particular piece of land for L. 10000. Titius is obliged to ratify his bargain, though he buy it for L. 9000. because ten comprehends nine: but if he pay L. 12000. for it, he is not obliged to ratify the bargain, because he exceeds the bounds of his commission.

13. Mandates expire either by the revocation of the employer, if the thing or business in which he was employed be entire;

entire; or by the death either of the person employed, or of the employer; or by renunciation of the person employed: but in all those cases, if the thing undertaken be not entire, the person employed, or his heir, may and must proceed to execute the mandate, notwithstanding of the revocation, death or renunciation. Mandatars are liable for exact diligence, & *culpa levissima*; because albeit the mandate be only *gratia mandantis*, yet the very nature of it implies diligence.

Diligence
of man-
datars.

14. Mandates are either expresse, arising from expresse consent; or tacite, which are inferred by signs and taciturnity: as for instance, if a person present suffers another to act in his affairs, he is understood to give him thereby a tacite mandate.

Div. of
man-
dates.

15. *2do*, Mandates are either general, for managing all affairs; or special, for doing some particular business, conform to the precise tenor of the commission. And albeit general mandates contain most ample power of administration, yet they are not extended to committing of crimes: nor, *2do*, To donations: albeit, where there

General
and spe-
cial man-
dates.

is any probable cause, gratifications may be allowed, which will be regulated *secundum arbitrium boni viri*, this being *contractus bonæ fidei*, which implies exuberant trust.

16. 3^{to}, No general mandate will imply a power to alienate immoveables, or to submit or transact any litigious business.

17. 4^{to}, If in the general mandate, some special cases are expressed, it will not be extended to cases of greater importance than those expressed.

18. The great favour of commerce has introduced another kind of tacite mandate, by which exercitors of ships and prepositors are obliged by the contracts of the masters of the ships, and of the insurers, in relation to the ships and voyages, or to the particular negotiations wherein they are intrusted.

Exercitor.

19. Exercitor is he to whom the profit of a ship doth belong, whether he be the owner, or hath only freighted the ship. The master is the person intrusted with the charge of the ship, who has power to oblige the exercitor, by contracting for the

the reparation and outrigging of the ship, and in matters relating to the voyage.

20. Institutors are intrusted with particular negotiations at land, such as keeping of shops, &c. and they oblige their prepositors in relation to the affair wherein they are intrusted, as exercitors are in maritime affairs.

Institutors.

21. Neither the masters of ships nor institutors need shew their commission, but their being in the office is sufficient to oblige the exercitors and constituents: and if there be many exercitors, the master's contract obliges them all *in solidum*, albeit what was borrowed be not employed for the use of the ship; only it must be known to the lender that the ship stood in need of such reparations. And the facts of the institutors will oblige their constituents, of whatsoever sex or age they be, and even though they be pupils, minors or wives, who cannot validly oblige themselves; for they have themselves to blame who intrusted such persons.

22. As all those obligations and contracts arise from express consent, so others

Homologation.

arise from tacite consent, such as homologation. As for instance, though a man be not obliged by a bond granted in minority, yet if he pay a part of it, or annualrent for it, after he is major, the obligation is thereby homologated or owned, and becomes valid, not from the time of the homologation, but from the date of the writ. And therefore it is fit, that such as design not to own null or invalid deeds, should abstain from doing any thing that may infer an approbation of them: but because homologation is *actus animi*, therefore it should not be proven by witnesses.

23. Because all obligations cannot be bound up under general and regular names of contracts, therefore the law allows some obligation to pass under the name of *quasi contractus*, because they have the resemblance and are of the nature of contracts; and these are *negotiorum gestio*, whereby, if any person manage your business advantageously for you, you are liable to him for his expence, though you gave him no mandate, lest such as are absent

Quasi contractus.

Negotiorum gestio.

sent should be prejudged by the negligence of their friends, and their averfeness to meddle with other people's affairs, where they are to have nothing allowed them for their expences; as the manager is liable to refund to the person whose affairs he managed, any prejudice done to him, since else any man might be invited officiously to meddle in another man's affairs to his disadvantage: but this is to be understood *si inutiliter gesserit*; otherwise, if he acted profitably, albeit the event do not succeed, he will get his expences.

24. The other *quasi contractus* are, tutory, communion of goods, entering heir, the obligation of repayment, that arises upon payment of what is not due: for if one be tutor to you, he enters in a kind of contract with you, whereby he is bound to administrate your affairs, and you are bound to pay him his expence. But of all these, I have treated elsewhere in their proper places, as I shall do of malefices, and what resembles them, when I come

Tutory.

to

to treat of crimes, of which these may be properly said to be branches.

Cauti-
onary.

25. Having thus treated of principal obligations, the only accessory obligation that I need mention is cautionry, where-
by one man becomes surety for another, either to pay a sum or perform a deed: betwixt which two there is this difference, that these that are cautioners for a sum, if they be bound conjunctly and severally with the principal debtors, may be pursued without pursuing the principal; and *quoad* the creditor they are principals: but these who are cautioners for performing of deeds, as cautioners for executors, and for curators or factors, or for messengers, cannot be pursued till the principal be discussed; for they being only obliged, that their principals shall compt or be honest, therefore they cannot be liable until the principals first be cited, to compt in the one case, or to answer for their delinquencies in the other: and they are only liable to make up what is wanting from their principals, after they are discussed.

26. Because

26. Because cautioners for sums, bound conjunctly and severally, are liable as principals, therefore their obligation may subsist, though the obligation of the principal party be found null, or reduced by any privilege given to the principal by law; as, if a man become caution for a minor, or for a woman who is married; *nam sibi imputet* who became a cautioner for such. But if the obligation was absolutely null in itself, as if the principal did not sign, then this obligation, because it is but accessory, retains so much of its own nature as to free the cautioner.

27. Cautioners are to get relief from their principals, not only of the principal sums and annualrents, but of all damage and interest, and whether the same be provided by the bond or not. And, where there are many co-cautioners, they are liable *in solidum, quoad* the creditor; but if any of them pay the whole sum to the creditor, though he get assignation from him to the whole, yet he must only seek his relief from the other cautioners, with deduction of his own part; which proceeds

Relief of
cautioners.

proceeds albeit there be no clause of mutual relief in the bond: and they must communicate to their co-cautioners what ease they get by way of transaction from the creditor; but if they get the said ease by a mere gratification, as by donation, &c. then they are not bound to communicate what ease they get; for a creditor may justly gratify one of his cautioners, as his friend and relation, without being obliged to gratify the rest.

Subject-matter of obligations.

28. To make obligations effectual, it is necessary that the subject-matter thereof be such as will admit of an obligation: for no man can oblige himself to do what is either impossible, unlawful or dishonest, nor to transmit the property of things sacred (these not being *in commercio*): and albeit, when the performance of obligations becomes imprestable, the party is liable for the value, as damage and interest, yet in these the value is not due, nor will he be liable in a penalty in case of non-performance.

29. But yet a man may oblige himself to do something not in his own power;

as

as to cause another dispoſe lands: and if he fail, he will be liable *pro damno & intereſſe*, or for the penalty.

30. Amongſt obligations donation is alſo reckoned, which is an obligation proceeding from a lucrative cauſe or title. For he who voluntarily and gratuitouſly promiſes to give any thing, is thereby obliged to deliver the ſame: and this voluntary giving is called a donation, which is in law defined to be *a mere liberality proceeding from no previous compulſion*.

Donation.

31. It may be perfected either by writ or without it; but, if without writ, it muſt be proven by oath.

32. Donations are either ſimple, remuneratory, or *mortis cauſa*, that is to ſay, donations made in contemplation of death.

Div. of donat.

33. A remuneratory donation, called *αντιδωρον*, is when a man beſtows any thing not gratuitouſly, but to requit and repay ſome good deed done to him; and ſo is not purely a donation.

Remuneratory donation.

34. A donation in contemplation of death is, *when the giver deſigns rather the perſon*

Donation in contemplation of death.

person to whom he gifts to have what is gifted than any other; but wishes himself to have it, rather than him to whom he gifts it. And therefore, though pure donations are not revocable, yet a donation *mortis causa* is, being of the nature of a legacy: and no donation is presumed to be *donatio mortis causa*, except it appear to be so, either expressly, or by strong presumptions, that the thing gifted was only gifted in contemplation of death.

35. Gifts being a mere liberality, are not presumed; and therefore, by our law, *debitor non præsumitur donare, quamdiu est debitor*. But this being only a *præsumptio juris*, may be taken off by stronger arguments, justly inferring that donation rather than payment was designed.

TITLE IV.

Of the dissolution or extinction of obligations.

1. **H**AVING cleared how obligations are constituted, it remains now to consider how they are taken off and extinguished; which is either by a contrary consent, or by implement and satisfaction.

2. Since consent is necessary to the constitution of obligations, so a contrary consent, whether by a discharge or *pactum de non petendo*, does dissolve and extinguish obligations; *nam nihil est tam naturale, quam eo modo quidque dissolvi quo colligatum est*. And therefore, if the obligation be constituted by writ, it requireth writ to the dissolution thereof, which is called a discharge: and discharges require the same solemnities that obligations do: but yet, if the obligation was satisfied *via facti*, as by intromission

Dis-
charge.

R

with

with rents of lands, &c. it is probable by witnesses, as all facts are.

Dis-
charges
general
and par-
ticular.

3. Discharges are either general, of all that parties can ask or claim; or particular, of one particular thing or subject. And in general discharges, if any particular thing be expressly discharged therein, the general clause will be extended to particulars of no greater importance than those expressly discharged.

4. Discharges do ordinarily bear a clause discharging all preceedings to their date: and albeit they do not, yet three consecutive discharges do presume that all bygones are satisfied, if they be immediately subsequent to one another, and granted by parties having power to discharge, as discharges by heritors or chamberlains to their tenants: and therefore discharges of three subsequent years, granted by merchants who bought the farm of these years, will not infer the presumption; but it will be inferred by discharges for a part of the three years granted by the father, and the rest by his eldest son, as heir; the discharges being in writ, containing a discharge

*Apocha-
trium an-
norum.*

charge of the whole year's rent: so that partial receipts, albeit they extend to more than the year's rent, will not presume that all preceedings are paid; neither one discharge for three subsequent terms or years, the presumption being inferred from renewing of the discharges each year, without reservation.

5. Obligations are extinguished and dissolved by payment, which is *performing of the obligation in the precise terms thereof*; and is so favourable, that if it be made *bona fide*, it dissolveth the obligation, albeit he to whom it was made had no right. So payment made to a procurator, after the procuratory was revoked without the payer's knowledge, will be sustained; and payment made to ministers serving the cure, though they have no title to the benefice, will liberate the payers. Payment.

6. Obligations are likewise fulfilled by acceptilation, which is *an imaginary satisfaction, whereby the creditor acknowledges to have got payment when he hath* Accepti-
lation.

not, and has the effects and all the privileges of payment.

Compensation.

7. *2do*, By compensation; whereby if the creditor of a liquid sum become debtor to his debtor in another liquid sum, the two obligations extinguish each other *ipso jure*, and is equivalent to payment in all cases: but if the sums be not liquid, or if a species or body be craved to compensate a liquid sum, it will not be allowed.

Innovation.

8. *3tio*, Obligations are taken away by innovation, which is, *the changing one obligation for another*: and if the person of the debtor be changed it is called delegation.

9. Innovation is never presumed, except it be expressly mentioned, or that the obligation bears expressly to be in satisfaction of the former.

Confusion.

10. *4to*, Obligations are extinguished by confusion; that is to say, when the debt and credit meet in the same person; as when the debtor succeeds to the creditor, or the creditor to the debtor, or a stranger to both. And the reason of the extinction in these cases is, because the same

same person cannot be both debtor and creditor.

TITLE V.

Of assignments.

1. **N**OT only moveable but heritable rights, whereupon no infeftment has followed, and all incorporeal rights, requiring no infeftment, such as reversions, patronages, servitudes, &c. are transmissible by assignment: but if *fasine* be once taken on an heritable right, it cannot thereafter be transmitted by assignment, but by disposition, which is *a writ disposing lands, or other moveable rights, containing a procuratory of resignation and precept of fasine*. And tho' a life-rent at first is to be compleated by a *fasine*, as differing from other heritable rights only in its endurance; yet, being once compleated, it may thereafter be transmitted by assignment; for it continues not then to be a formal life-rent right in the person of the assignee, but resolves

Assigna-
tion.

Disposi-
tion.

only in a temporary right during the cedent's lifetime.

Cedent
and as-
signee.

2. He who grants the assignation is called the cedent, and he who receives it is called the assignee.

Intima-
tion.

3. An assignation is also compleated by intimation; and therefore, in competition betwixt divers assignees, the first intimation is always preferred. This intimation is made by a procurator, who takes instruments in the hands of a notar, that such an assignation was intimated (so that one man cannot be both notar and procurator); and if after this the debtor pay the cedent, he must repay it to the assignee, because the cedent was denuded by the assignation; and the intimation puts the debtor *in mala fide* to pay the cedent. And for that same reason the cedent's oath will not prove against the assignee, if the assignation be for an onerous cause, and was duly intimated.

4. But if the assignation be gratuitous, or for the cedent's behoof; or if the matter be litigious, the assignation being after a depending process; in any of these cases the

the cedent's oath will prove against the assignee.

5. A pursuit or charge of horning upon the bond assigned has likewise the force and effect of an intimation.

6. The debtor's private knowledge of the assignation is not equivalent to an intimation; but his paying a part of the sum, or annualrent for it, is equivalent to an intimation; and much more the writing a letter promising to pay, since that is in effect renewing the obligation.

7. Bills of exchange, and orders by merchants to pay, need not be intimated, because in commerce we are governed by the law of nations. Nor need assignations to reversions be intimated, because the registration is a publication of them (the registration of sasines and reversions being designed for publication). But the using inhibition against the cedent, upon the assignation, is not equivalent to an intimation, the chief design of inhibitions being for execution, and not for publication. Legal and judicial assignation, such as apprisings, adjudications and marriage, need

need no intimation; and that because they are past and expedite publicly.

Blank
bond.

8. A blank bond is equivalent to an assignment, and so must be intimated. And, in competition with other rights it is only preferred according to the date of the intimation, that the receiver's name was filled up in it.

9. It is a general principle in our law, that in the competition of more creditors, the first compleat diligence is still preferred: and therefore an assignment is preferred to an arrestment, if it be intimated before the arrestment: but if the intimation and arrestment be in one day, they come in *pari passu*, except the arrester be *in mora*, and do no diligence upon his arrestment; or that both diligences express the hour of the day, and the one be prior to the other.

TITLE

T I T L E VI.

Of arrestments and poindings.

1. **T**HE ordinary diligence in our law affecting moveable rights are arrestment, which answers to inhibition in heritage; and poinding, which answers to comprising in heritage.

2. Arrestment is *the command of a judge, discharging any person in whose hands the debtor's moveables are, to pay or deliver up the same, till the creditor, who has procured the arrestment to be laid on, be satisfied.*

Arrestment.

3. Arrestments may be laid on by any judge in whose territories the goods are, or by the lords of the session, where ever they lie, and that by special letters of arrestment, or by a warrant expressed in the ordinary letters of horning. These letters are executed by a messenger. And if, after it is laid on, the party in whose hand it is made pay, he may be forced to pay the same over again, or may be pursued

sued criminally for breaking arrestment, the punishment being confiscation of moveables, and their persons to be in the king's will *.

* Parl.
1581.
c. 118.

4. Arrestment can only affect moveables; but all sums of money due by bonds whereupon no infestment has followed are arrestable †. And as moveables can only be arrested, so the ground thereof must only be for payment of moveable debts, or, *ex partitate rationis*, for payment of such debts which are not secured by infestment; and it reaches only to the sums already due, or for which the year or term is current.

† Parl.
1661.
c. 51.

Arrestment upon a dependence

5. How soon an action is raised against a person, his goods may thereupon be arrested; and this is called an arrestment upon a dependence. But this arrestment may be loosed by letters for loosing of arrestment which passes upon a common bill; and a band of cautionry is given to the clerk of the bills ‡, wherein the grantor of the band obliges himself to pay the sum, if the arrestment be found lawful; and the sums or goods decerned to belong

‡ Parl.
1617.
c. 17.

to

to the arrester. But arrestments upon a decret, or, which is equivalent, on a registered bond, cannot be loosed at all, except the decret be turned into a libel; that is to say, the lords do only sustain the decret as a libel or summons against the defender, or that the arrestment was laid on after the decret was suspended: for, in either of these cases, arrestments may be loosed even upon decreets.

6. Arrestment being but a personal prohibition against the defender to pay, it lasts no longer than the lifetime of him in whose hands the arrestment is made, except it be renewed against his successors. But it dies not with him in whose favours it was raised, nor with him for whose debt it was laid on: and if the debt be not liquid, the debtor's representative must be called to the liquidation.

7. In the competition amongst more arresters, preference is granted according to the priority even of hours; and the first arrestment is not preferred, if the posterior arrester get the first decret to make the arrested goods forthcoming. For arrestment

Compe-
tition of
arrest-
ments.

restment being only an inchoated diligence, it is compleated by the sentence to make forthcoming. And yet, if the arrester did exact diligence to obtain a decret, his raising the first pursuit will prefer him. He also who arrests on a decret will be preferred to him who arrests on a dependence, and he who arrests after the term of payment will be preferred to him who arrests before the term, *cæteris paribus*.

8. The king's pensions and gratuitous aliments cannot be arrested, because they are given for a particular and favourable use, and not applicable to the arrester.

Poin ding

9. Poin ding may be likewise used against moveables by virtue of letters of horning against the debtors, containing poin ding, or any inferior judge his decret or precept*; which is done by a messenger, after the days of the charge are expired †. The form thereof is, the messenger, after poin ding the goods, apprises them upon the ground where he apprehends them, and offers them to the debtor for the sum for which they were apprised:

* Parl.
1606.
c. 10.
Parl.
1661.
c. 29.
† Parl.
1669.
c. 4.

prised: and, if he compear not, he carries them to the market-cross of the head burgh of the shire, or other jurisdiction where they are poinded, and there he apprises them, and delivers them to the party, who is called the poinder. But if any compear, and offer to make faith that the goods belong to them, and not to the debtor, then the messenger must deliver to that party, else he is liable in a spuilzie.

10. Poinding is a judicial sentence, and the messenger is judge constituted by the letters. The messenger writes likewise an execution of poinding, and that execution is better believed than any who offers to prove the contrary, for that execution is only quarrelable by improbation.

11. Arrestment being but an inchoated diligence, discharging the party in whose hand the arrestment is made to pay, the right to the goods arrested remains still in the debtor, and may be poinded for his debt; but poinding is a compleat diligence, giving an absolute right to the goods poinded.

S

12. Poind-

12. Poinding cannot be after the sun is set, for it is a sentence.

13. Labouring oxen, or other plough goods, cannot be poinded in time of labouring, (lest labouring should be otherwise discouraged) except there be no other moveables upon the ground to be poinded*.

* Parl.
1503.
c. 98.

T I T L E VII.

Of prescriptions.

1. **P**rescription being a way of evacuating and annulling both heritable and moveable rights, comes in here, after both these are explained.

Prescription.

2. Prescription is defined, *an acquisition of property by the possessor's continuing his possession for such time as the law determines.* Which was introduced not only for punishing the negligence of the proprietor who owned not his right for so many years, but likewise for securing possessors, and such as derived right from them; and lest, by a constant uncertainty,

ty, the possessors being unsecure, might neglect the improvement of what they possessed.

3. Heritable rights, (under which I comprehend wadsets, heritable offices, servitudes, patronages, &c.) and all actions depending upon them, or relating to them, prescribe with us in forty years; if the possessor, being a singular successor, have a charter, disposition, or precept and sasine in his person; or, being an heir, have a constant tract of sasines continuing and standing together for the space of forty years, flowing upon retours or precepts of *clare constat**. For the law did not trust a sasine alone, it being only the assertion of a notary. But reversions which are in the body of the possessor's right, or reversions duly registered, prescribe not.

Prescription of heritable rights.

* Parl. 1617. c. 12.

4. All personal rights, and actions relating to them, prescribe likewise in forty years, if a document be not taken upon that right; that is to say, if nothing be done whereby the true proprietor declares his intention to follow and own his right ‡.

Prescription of personal rights.

‡ Parl. 1469. c. 28. & 1474. c. 54.

S. 2.

5. In

5. In both of these prescriptions the extraordinary length of time supplies the want of *bona fides* in the possessor. But, by the Civil Law, things sacred, religious or public, could not be prescribed, nor yet things robbed or stolen, there being a *vitium reale* which affects all those things. But whether this will hold in our law, is neither clear by our statutes nor decisions.

Prescriptions of particular actions.

6. Actions of spuilzie and ejection prescribe in three years after committing thereof, as to the specialities of these actions, viz. the violent profits, and oath *in litem*. But minors have three years after their majority *.

* Parl.
1579.
c. 81.

7. As do also actions for servants fees, house-mails and merchant accompts; except they can be proven after these three years by the debtor's oath †: and removings, if action be not intended within three years after the warning ‡. And in these last prescriptions minority is not excepted.

† Parl.
1579.
c. 83.
‡ Parl.
1579.
c. 82.

Affizers.

8. If affizers err in serving a man wrongously heir to his predecessor, the retour may be quarrelled within twenty years;

years; but the assizers themselves can only be pursued for error within three years*. But the right of blood itself never prescribes; and therefore a man may be served heir to his father or grandfather after a hundred years, being debarred by no time; *nam jura sanguinis nullo jure civili adimi possunt*. But this is to be understood where there is no service; for if there be once a service, tho' of a wrong person, it cannot be quarrelled after twenty years.

* Parl.
1617.
c. 13.

9. If a person who is forfeited possessed lands, as heritable tenant, for five years before the forfeiture without interruption, the king is obliged to show no right in the person of him who was forfeited to the lands, or others that he possessed; because it is presumed that the person forfeited would abstract the writs. Which quinquennial possession is to be tried by an inquest of the shire where the land lyes†. And if the traitor was in possession the time of the forfeiture, though he possessed not five years before the forfeiture, the king or his donator must be

† Parl.
1584.
c. 2.

continued in possession for five years, that in the mean time the traitor's tacks and other rights may be sought out.

10. Arrestments on decreets and depending actions prescribe within five years, viz. arrestments on depending actions five years after sentence, and on decreets five years after their date.

11. Mails and duries due by tenants prescribe, if not pursued within five years after the tenant's removing. Ministers stipends and multures prescribe, so that they cannot be pursued after five years, except they be proven by the debtor's oath, or by writ.

12. Holograph bonds, and subscriptions in accompt books, prescribe in twenty years, except they be proven by the debtor's oath.

13. And, lastly, all bargains probable by witnesses prescribe, as to that manner of probation, if not pursued within five years after their date. All actions on warnings, spuilzies, ejections, arrestments, ministers stipends, &c. prescribe in ten years, unless wakened every five years; but

but this alters not any shorter prescriptions of these actions *.

* Parl.
1669.
c. 9.

14. And for clearing the meaning of the statute appointing these prescriptions, by a late statute, *an.* 1685, it is ordained, that all those actions mentioned in the said act 1669, which were intended or depending before the date of the said act 1685, should prescribe within five years thereafter, if they be not wakened within that time; and all actions to be intended after the said act should prescribe within five years, if they be not wakened within that time.

15. All these prescriptions run *de momento in momentum*; so that the prescription runs till the last moment of the time allowed. But they run only from the time wherein the debt could have been pursued, since till then the proprietor could not be called negligent, which negligence is the main foundation of prescriptions; and therefore prescription runs not against a bond from the date thereof, but only from the term of payment; and prescription of an action of warrandice

* Parl.
1617.
c. 12.

warrantice runs only from the eviction *, because no man is liable in warrantice till the lands be evicted. And from the same principle it is that *contra non valentem agere non currit præscriptio*; and that prescription runs not against minors in most cases, in whom negligence is not punishable, since it proceeds from no design, but from the unripeness of their age.

16. Vassals cannot prescribe against their superiors, because the vassal's right acknowledges the superior's; nor can laicks prescribe a right to tiends, being incapable of such rights after the Lateran Council. But though the right itself prescribes in neither of these cases, yet the bygones due by virtue of these rights before forty years may prescribe.

Prescription.

17. Prescription runs against the kirk and mortifications; but, on the other hand, because churchmen are negligent, and rights may be lost in the change of intrants, therefore thirteen years possession is sufficient to maintain a churchman in possession; which is called *decennalis & triennalis possessio*, and is a presumptive

tive title, and sufficient till a better be shown, by which it may be excluded; for *præsumptio cedit veritati*.

18. Prescriptions run likewise against the king, except as to his majesty's annexed property, or to his unannexed property, whereof the farms, duties or feu-farms, have been compted for in exchequer, since August 1455 years ‡.

‡ Parl.
1633.
c. 12.

19. Any deed whereby the true proprietor owns his right, during the course of the prescription, is called interruption. And prescription is interrupted in our law either by a process, or a charge raised within the years of the prescription: and a citation on the first summons interrupts, though thereafter past from *pro loco & tempore*. But registration of a writ interrupts not prescription; and interruption by citation is not sufficient, unless it be made by messengers personally, or at the party's dwelling-house, and that it be renewed every seven years †, and that the execution be signed by the messenger and witnesses.

Inter-
ruption.

† Parl.
1669.
c. 10.

20. Diligence

20. Diligence used upon a writ interrupts, as to all parties concerned therein, for it hinders the writ itself to prescribe: and therefore diligence against any one of more principals, or against any of the cautioners, interrupts prescription, *quoad* the whole principals and cautioners. And interruption as to a part interrupts the prescription of the whole; so that if a man arrest the mails and duties of any part of a barony, he interrupts prescription as to the whole barony.

T I T L E VIII.

Of succession in heritable rights.

1. **H**AVING formerly shewed how rights, whether heritable or moveable, real or personal, are constituted, and how they are transmitted to singular successors; it remains now to consider how these rights are transmitted by succession, beginning first with succession in heritage.

Heir.

2. An heir is *he that succeeds universally to all that belonged to the defunct;*
and

and is therefore, in construction of law, one and the same person with the defunct.

3. Though the executor be in effect the heir in moveable rights, yet we call those only properly heirs who succeed in heritage: and with us there are several kinds of heirs, distinguished by their several denominations.

4. The first and chief kind of heirs are the heirs of line, who are so called because they succeed lineally, according to the right of blood: and they succeed thus;

Heir of
line.

5. First, descendents, according to the proximity of their degree; in which the eldest son is preferred to all his brothers, and all the brothers to the sisters; and if there be only sisters, they succeed all equally.

Descen-
dents.

6. The next degree is grandchildren and their great-grandchildren, &c. who succeed all in the same way.

7. If there be no descendents, then collaterals succeed, in which the first degree is brothers and sisters-german, for the whole blood excludes the half blood, and brothers the sisters; and brothers by the father's

Collate-
rals.

father's side exclude brothers by the mother's side, there being no succession with us by the mother's side.

8. Failing descendents, and brothers and sisters, whether german or consanguinean, the succession ascends first to the defunct's own father, who excludes all his own brothers and sisters, the defunct's uncles and aunts; and, failing them, the father's brother (observing the same rules formerly mentioned in the succession of brothers and sisters); and, failing the father's brothers and sisters, the grandfather; and, after him, his brothers and sisters the same way, according to the propinquity of blood, and so upwards, as long as any propinquity can be proven; all which failing, the king succeeds, as *ultimus hæres*.

Right of
representa-
tion.

9. It is to be observed, that in heritage there is a right of representation, whereby the descendents exclude still the collaterals, though nearer by many degrees to the stock, or *communis stipes*. And thus the great-grandchild of the eldest son excludes the second brother, because he comes

comes in place of, and so represents, the elder brother, his great grandfather.

10. The heir of line has right to the heirship moveables, and excludes all other heirs therein. Heirship moveables are the best of each kind of moveables, which is given to the heir; because he is excluded from all the other moveables. If there be pairs or dozens, he gets the best pair or dozen; but in others he gets only one single thing. None have right to heirship moveables but the heirs of prelates, under which are comprehended all beneficed persons; the heirs of barons, under which are comprehended all who are infest in lands or annualrents, though not erected into a barony; and the heirs of burgesses, by which are meant actual trading, but not honorary burgesses. And if a man was once a baron, he is still presumed to continue so, except it can be proved that he is divested: and that is the sense of the brocard, *semel baro semper baro*.

Heirship
move-
ables.

11. An heir of conquest is he who succeeds to the defunct in lands and other

Heir of
conquest.

T

heritable

heritable rights, to which the defunct did not himself succeed as heir to his predecessors. As for instance, what a father leaves to a second son is conquest, tho' he got the same from his father; because he was not *alioqui successurus*. But if the father dispoſe to his eldest son any part of his estate, this is not conquest, but *præceptio hæreditatis*, because he was *alioqui successurus*. And the rule is, that heritage descends, and conquest ascends; so that if the middle of three brothers die, his immediate elder brother would be his heir of conquest; and if a son of a second marriage die, leaving three brothers of a former marriage, the youngest would succeed in his conquest lands. And this I conceive was introduced for enriching the elder brothers, whom our law still favours. Whereas heritage must descend according to the law of nature.

12. These heirs of conquest have right to all lands, annualrents and heritable bonds and others, whereupon infesment did or might follow; but they have no right to tacks, pensions, moveable heirship,

ship, and all other rights having *tractum futuri temporis*, and requiring no infeftment, and so not competent to executors; all which belong to the heir of line.

13. The heir-male is *the nearest male who can succeed*; and all heirs of line are also called general heirs, because they succeed by a general service, and represent the defunct universally.

Heir-male.

14. The heir of tailzie is *he to whom an estate is tailzied*; so called because the legal succession is cut off in his favours, from the French word *tailler*, to cut: and the matter of tailzies may be summed up in these few conclusions.

Heir of tailzie.

15. 1779. If a fiar or proprietor do only substitute the persons who are to succeed one to another, this is called a simple destination; and it may be broke or altered by the maker, or by the respective members as they succeed, even though an inhibition were served thereon; for there being no obligation not to alter, there can be no foundation for an inhibition.

16. 2do, If the maker design that his tailzie should not be altered, he either

adjects a prohibitory clause *de non alienando*; and then though the maker may alter it, yet neither the institutes nor substitutes can alienate by any voluntary or gratuitous deed; for else that deed would be reduceable on the act of parliament 1621, as done in prejudice both of the maker and of the remoter substitutes, who are to succeed, and who are creditors by the said prohibitory clause; or inhibition may be raised upon the said prohibitory clause, after which the tailzied lands cannot be disposed even for an onerous cause.

17. 3thio, If the maker design that the tailzied lands should not be alienable even for onerous causes, then he adjects to the *pactum de non alienando* a clause irritant and resolute, declaring all deeds done contrary to and in prejudice of the tailzie to be null and void: and, in that case, all posterior alienations, even for onerous causes, will be reduceable, though no inhibition be raised thereupon. And because such clauses prejudge creditors and commerce very much, and seem to be inconsistent

consistent with the nature of property and dominion, therefore an act * of parliament was necessary for securing them: and generally in all these cases the contraveener prejudices not only himself, but all the heirs that might succeed by him; so that there is place for the next substitute, who may, in either of these cases, serve himself heir to the maker; (though generally a man should be served heir to him who was last infeft) or he may serve himself heir to the contraveener who was last infeft, without being obliged to fulfil his deeds.

* Parl.
1685.
c. 22.

18. 4^{to}, If a man oblige himself to tailzie his lands, he is obliged once to tailzie, but not to continue the tailzie: but if the obligation be made for an onerous cause, the same is not revocable, as if the tailzie be mutual.

19. 5^{to}, Where tailzies are made to two strangers jointly, and their heirs, they succeed to equal halves, and they are both fiars. But if lands be taken to a man and his wife in conjunct fee and liferent, and their heirs, the husband is fiar, and the

wife's conjunct fee resolves only in a life-rent: and yet in substitutions to moveables, both their heirs would succeed equally.

20. 6to, In conjunct-fee's these general rules hold; that the husband is *fiar*, because of the prerogative of the sex; and that he is *fiar* on whom the last termination falls: yet both these rules hold only *præsumptive*, and may be overbalanced with stronger presumptions. As, for instance, if the reversion of lands belonging to the wife as *heretrix*, be taken to the husband and wife, and their heirs; the wife's heirs would exclude the husband's heirs; for it is presumeable that the reversion should follow the heritable right. Or, if a father should take security in lands to himself, his son and their heirs, the father would remain *fiar*: which does likewise hold, though the security were taken to the father and son *nominatim*, and the son's heirs, even though the son were infest: for it is presumeable that the taking infestment was only designed to compleat the security, and to substitute the son, but
not

not to exclude the father from his own fee. And, generally, in all substitutions, the chief thing to be considered is the design of the parties.

21. Heirs of provision are *these who succeed by virtue of a particular provision in the investment*; such as the heirs of a second marriage. And, as to these heirs of marriages, we may observe three things. 1st. That if a father by his contract of marriage be obliged to employ a sum to himself and the wife in conjunct fee, and the heirs of the marriage, he cannot in prejudice thereof do any fraudulent gratuitous deed, though he may provide a jointure to a second wife, or provisions for his children of a second marriage.

Heirs of
provision.

22. 2^{do}, Though a father may assign or dispoſe ſums to children, when extant, whereby they will be preferred to poſterior creditors, as becoming ſiars by the ſaid rights; yet if the father diſpoſe to children to be procreate, this will be conſidered only as a deſtination, and ſo will not hinder the father to make poſterior rights,

rights, or even posterior creditors to affect by diligences what is so disposed.

23. *3tio*, Process will be sustained at the instance even of the apparent heir of the marriage, against the father, to fulfil the special obligations therein, or to purge any deeds already done by him in prejudice thereof.

24. Albeit, where heirs are not specially designed in any right, the heirs of line exclude all other heirs; yet if a man take lands to himself, and his heirs male, tailzie or provision, and thereafter acquire reversions or tacks of the same lands to himself and his heirs; these rights will accresce to that special heir to whom the land was provided: for it is not presumable that a man would give the lands to one, and the right of them to another heir.

Heirs
portion-
ers.

25. When women succeed, all these of one degree succeed equally; and, because the estate is divided amongst them, they are called heirs portioners, the eldest not secluding the rest, and having no advantage over them. But where the rights
are

are indivisible, such as titles, jurisdictions, superiorities, and all the casualties of these superiorities, such as ward, marriage, non-entry, feu-duties, &c. these fall all to the eldest heir-female, without division; together with the principal messuage, it being a tower or fortalice; for other houses are divided equally.

26. All these heirs are liable for their predecessor's debts *in solidum*, if they once enter heir; except heirs portioners, who are only liable *pro rata*; and heirs substitute in a sum, who are only liable to creditors in the value of the sum to which they are substitute. But they have in Scotland a privilege which they call the benefit of discussion, whereby the heirs of line must be first pursued, to fulfil the defunct's deeds or pay his debts; and next to these the heir of conquest, the heir-male, the heir of tailzie, and heirs of provision. But for fulfilling a deed relating to particular lands, the heir who succeeds in these particular lands must be first pursued without discussing; and that which is meant by discussing is, that the creditor

Benefit
of discus-
sion.

creditor must proceed by horning, capti-
on and apprising, or adjudication, against
the heir who is to be discussed, before he
can reach the other heirs.

Heir ac-
tive.

27. An heir is said with us to be heir
active, who is served heir, and may pur-
sue: whereas he whom the law makes
liable to be heir is said to be heir *passive*;
as when the apparent heir is infest upon
a precept of *clare constat* by the superior,
or otherwise meddles with his father's e-
state.

Heir
passive.

Appa-
rent heir.

* *Annus*
deliberan-
di.
Parl.
1621.
c. 27.

28. When the predecessor dies, he who
should be heir (and therefore is called ap-
parent heir) has year and day allowed him
to deliberate whether he will be heir,
which is called *annus deliberandi**, and
which is indulged by the law, because if
a man enter once heir he is liable to all
the debts, though far exceeding the estate:
and within that year he cannot be pur-
sued; nor obliged to enter; but after the
year is expired, the creditor may charge
him to enter heir; and if he resolve not
to enter, he must renounce any right he
has by a writ under his hand.

29. This

29. This year is computed from the defunct's death, except in a posthumous child, who has a year allowed him after his birth: and not only during this year, but after it expires, the apparent heir, without instructing any title, may pursue for exhibition of all rights made to his predecessors, and of all rights made by his predecessors, to any in his own family, (but not to strangers) to the end he may deliberate whether he will enter heir. The apparent heir may also defend his predecessor's right, and continue his possession, by pursuing for mails and duties, though he renounce. *Vide supra*, Book II. Tit. 9. §. 45.

Posthumous child.

30. If the apparent heir resolves to enter heir to his predecessor, he must raise briefs from the chancery; which brief is a command from the king to the judge ordinary where the lands ly, to cause try, by an inquest consisting of 15 sworn men, whether the raiser of the brief be nearest heir: and this is executed or proclaimed at the market-cross where the lands lie. And if at the day appointed

appointed the inquest find him to be the next person who should succeed, they serve him heir by a paper which is called a service, and which being returned by them to the chancellor, there is a writ given to the heir, and which is called the return, because it is their answer and return to the chancellor of the points contained in the brief: and thereafter the person who is served heir is infeft by precepts out of the chancellor; which infeftment must be given by the sheriff or his deputies, and the sheriff-clerk as notary thereto. And if the service was to any particular lands, it is called a special service; but if there was no land designed, it is only called a general service: and this general service may be before any judge, and is sufficient to establish a right to heritable bonds, dispositions, reversions, jurisdictions, and all other rights whereupon the defunct was not infeft, nor needed to be infeft. And a special service includes a general service, but not *e contra*. 31. The

General
brief.

31. The general brief hath only 2 points or heads, *viz.* If the defunct died at the king's peace; and if the raiser of the brief be the next heir: but the special brief has seven, *viz.* When the defunct died; *2do*, If he did last vest and seased, at the king's peace; *3tio*, That the raiser is next heir; *4to*, Of whom the lands are holden *in capite*; *5to*, By what manner of holding; *6to*, What is their old and new extent; *7mo*, Whether the raiser be of lawful age; and in whose hands the lands are at present.

32. Sometimes likewise the vassal, without serving himself heir, gets a precept of *assise* from the superior, wherein, because the superior declares that it is known to him that such a man is heir to his father, it is therefore called a precept of *clare constat*; which therefore makes the obtainer liable *passive* to all his predecessor's debts, but gives him only right *active* to the particular lands contained in the precept. Nor will it give him a right even as to these lands, except against those

U

who

who derive right from the superior who gave it.

‡ Parl.
1567.
c. 27.

33. Bailiffs also of burghs royal do infect their burgesses in burgage lands ‡, by giving them *sasine* as heirs, and delivering them for a symbol the hasp and staple of the doors: and the *sasine*, in that case, is in place of a service, as to these lands; but is not, in other cases, a sufficient active title. And these *sasines* must be given by the baillies and the common clerk of the burgh, as notary, otherwise they are null.

34. The heir who is retoured holds either his lands of the king, and then he gets precepts out of the chancellery, to the judge ordinary, to infect him; which if he refuse, the lords, upon a supplication, will direct precepts to any other person, who is thereby made a sheriff in that part. But if the lands hold of another superior, then either that superior is himself entered, or not: if he be entered, he will be charged by four consecutive precepts to enter the heir; and if at last he disobey, his immediate superior will be charged,

charged, and so till the heir arrive at the king, who never refuses to enter any: and if the superior be not entered, he must be charged upon forty days to enter, that, being himself entered, he may enter his vassal; and if he refuse or delay, he loses all the non-entries of his vassal during his life, but no other casualties, because *quoad* these he was not culpable.

35. Though the person who should be heir do not enter to his predecessor's heritage, yet he may be made liable to his predecessor's debt, by two passive titles relating to heritable rights, *viz. gestio pro hærede*, and as *successor titulo lucrativo post contractum debitum*; and there is a third passive title relating to moveables, which is called vitious intromission.

36. Behaving as heir, or *gestio pro hærede*, is when the person who might have been heir immixes himself, and intromits with either the moveable heirship, or any heritable estate belonging to the defunct; in which case he is liable to the creditors, not only according to the value of what

Behav-
ing as
heir.

he intromitted with, but as far and in the same manner as if he had been entered heir. And yet the lords will not sustain this passive title, because of its extraordinary hazard where the intromission is very small, or where he has a colourable title to which he might ascribe his intromission, as a factory from the compri-fer or gift to the escheat or recognition, *gestio pro hærede* being *magis animi quam facti*; which factories will defend, though there was no declarator. But if the apparent heir had no factory, it is not sufficient to alledge the defunct died rebel, and so could have no heir, except his escheat was declared before intromitting the pursuer's action. Nor will this passive title nor vitious intromission be sustained beyond simple restitution, except they be pursued in the intromitter's own life-time, they being kinds of delicts.

37. But he will not be liable if the defunct's right was reduced, though after his intromission. And since this passive title was introduced by the lords of session in favours of the creditors, to deter appa-
rent

rent heirs from fraudulent intromission; therefore an apparent heir paying his predecessor's debt will not infer this passive title, since that is for the advantage of creditors: nor will the getting of money for ratifying a comprising that is expired infer this passive title, since the creditors would have got no advantage by that right. But if the apparent heir had consented before the comprising was expired, it would be a passive title; because, as heir, he might have redeemed the comprising. And if an apparent heir grant bond to a confident person, for his own behoof, and that confident person comprises or adjudges the heritage thereupon, his intromission by virtue of that apprising will not defend him † against this passive title, whether the legal be expired or not; but he will be liable as if there were no such right in his person.

38. *Succesor titulo lucrativo* is where the apparent heir, to preclude the necessity of entering heir, and so being liable to the creditors, gets a disposition from him to whom he would have been heir,

Act of
Sederunt,
28. Feb.
1662.

*Succesor
titulo lu-
crativo.*

without any onerous cause ; the receiving whereof, though it be a small part of the estate, makes him liable to the payment of all the creditor's debt ; if the right made, as well as the infestment, was posterior to the creditor's lawful debt. But if there be an onerous cause, then either it is not near equivalent to the value of the lands disposed, and in that case it will not defend against this passive title ; or, if it be near to the value, it will defend against it, but not against restitution of that value. And since this passive title overtakes such as might have been heirs, therefore a disposition granted to a grandchild will make him successor *titulo lucrativo*, though the father be alive ; since, by the course of succession, he would in time have been heir, though he was not immediate heir. But since this can only reach apparent heirs, therefore a disposition made by one brother to another, tho' the maker had no children, will not make him *successor titulo lucrativo*, since the brother might have had heirs himself, and so his brother was not his apparent heir.

39. This

39. This passive title holds only in heritage; and therefore the getting a right to moveable heirship and tacks will not infer the same.

40. *Gestio pro hærede* and *successor titulo lucrativo*, being passive titles, whereby, in odium of the irregularity of the intromission, they are made liable as heirs; therefore these passive titles can extend no further than if they intromit with or take a disposition to these things to which they might have succeeded; and so not inferred against an heir of tailzie, intromitting with, or getting a disposition of what would have fallen to the heir of line. Nor can they be extended further than if they had been served heirs. And thus an heir-portioner will be no further liable in these than *pro rata*, as if she had entered; for the copy should go no further than the original.

41. To conclude the succession in heritage, it is fit to know, that by an old statute*, and our constant practice, a man cannot dispoñe his heritage upon death-bed, in prejudice of his heirs; that is to say, neither lands

nor

Rights
on death
bed.

* Stat.
Will.
Reg.
cap. 13.

nor heritable bonds, nor any bond, tho' moveable, in so far as his heritage may be thereupon apprised or adjudged, can be then disposed; so jealous was our law of the importunity of churchmen and friends, and of the weakness of mankind under such distempers. And therefore, if a man has made any right in prejudice of his heir, after contracting sickness, tho' he was found enough in his judgment for the time, and continued sound for a very long time; yet this right will be reduced, as done *in lecto*, or upon death-bed, either at the instance of the apparent heirs, or at the instance of the apparent heirs creditors: and it is sufficient to prove sickness, though it be not proved mortal; and that he was sick, without proving that he died of that sickness, or was sick the very time of the disposition.

42. If thereafter the maker of such a right come to kirk or market unsupported, the law presumes that the maker was reconvalesced, and so the deeds reconvalesce with him. But since the law has fixed upon kirk and market, as open places,

places, where the disponder might be seen by all men, and by unsuspected witnesses; equivalent acts, as going to make visits, though at a greater distance, will not be sustained. But though a man cannot grant a new right upon death-bed, yet he may perfect an old right, or do a deed to which he might have been otherwise compelled, as for payment of his debt; or may grant a rational jointure to his wife, though he cannot grant provisions to his children in that condition. And all deeds done with the consent of his heir are valid; because this law is introduced in favours of heirs, whether they be heirs of line, male, or tailzie, or provision.

T I T L E IX.

Of succession in moveables.

1. **T**HE same rules are observed in the succession of moveables that were formerly specified in the succession of heritage, except as to these particulars, *viz.* all of one degree succeed equally; and so,

so, amongst brothers and sisters, the elder exclude not the younger, nor males the females, as in heritage: and in moveables there is no right of representation, as in heritage; and therefore, if there be a brother and two sisters alive, and a third sister's children, the brothers and sisters who are living will succeed equally, excluding the children of the sister who is dead.

Testa-
ment.

2. A testament or latter-will does require to be in writ; for nuncupative testaments (which were so called in the Civil Law, because the defunct named his heirs without writ) are not allowed by our law, by which a testament must either be holograph, all written with the defunct's own hand, or at least subscribed by him before two witnesses, if he can write; or, if he cannot write, by a notary, or minister and two witnesses.

3. No heritable right can be left in testament, tho' the testator was in *leige-poultie*, or perfect health, and though the testament be made in other nations, where heritage may be disposed by testament; yet

yet it will not transmit a right to heritage lying in Scotland. And yet a testament made according to the solemnities of these nations will be valid in Scotland; for though they may regulate us as to solemnities, yet they cannot alter the nature, and so not the transmission of our rights.

4. A legacy is a donation left by the defunct, in any writ, to be paid by his executor. But if the legator die before the testator, or before the condition is fulfilled on which the legacy was left, then the legacy evanisheth. And though neither other men's moveables, nor a man's own heritable rights, can be left in legacy, yet such legacies are valid, if the testator knew that the sum left was heritable, or belonged to others: and the executor in those cases must pay the value.

Legacy.

5. A minor being above fourteen years may make a testament, without the consent of his curators; but under fourteen years he can make none: a wife may make a testament without the consent of her husband; and a person interdicted without the consent of the interdictors:

but

but idiots, nor furious persons, can make none, except in their lucid intervals; nor bastards, except they be legitimated, or have children of their own.

*Jus relic-
tae.*

Legitim.

6. If a man be married, the wife has, without paction, a share in his moveables, of which he cannot defraud her by his testament; and this is called *jus relictae*. And if there be children, the law has provided a portion of the moveables for them, which is therefore called their legitim, and of which their father cannot prejudice them by his testament; but there is no legitim due by the mother's death; nor have children who are foris-familiated, that is to say, who are married, and have renounced their portion-natural, any legitim due to them.

7. This legitim is also due only to the immediate children, but not to grandchildren.

*Dead's
part.*

8. The remainder of the defunct's moveables, beside what is due to the relict and children, is called the dead's part; and upon that only he can dispone.

9. If

9. If a man have no wife nor bairns, all is the dead's part, and may be disposed by him : if there be either wife or bairns, and not both, then the defunct's testament receives a bipartite division ; but if there be both wife and bairns, then it receives a tripartite division.

10. By the Civil Law a testament was null, if the heir was not named ; but with us a testament is valid, though the executor be not named, who is the heir *in mobilibus*, and is called executor, because he executes and performs the defunct's will. Executor

11. By our law, relict's and children dying after their husbands and fathers, but before confirmation of their testaments, do transmit their interest in the defunct's moveables to their nearest of kin, viz. the children their legitim or bairn's part, and the relict her share of the moveables. The bairns also, as nearest of kin, have right to the whole dead's part ; and the executor not being nearest of kin, must compt to them therefore, retaining only a third of the defunct's part,

X

which

‡ Parl.
1617.
c. 14.

which is allowed to him for executing the testament ‡ (if he be executor nominate, for an executor-dative gets no allowance); and if there be a legacy left to the executor nominate, it is imputed in payment of his third. But the dead's part, whether falling to children or to the other nearest of kin, failing children, is not transmitted without confirmation; for both the relict's part and children's legitim arise by the death of the father or husband, and so needs no confirmation or other constitution: but the nearest of kin's right is by succession, and consequently requires confirmation for establishing it, without which it cannot be transmitted to their executors: for as an heir in heritage must be entered, otherwise he cannot transmit his right; so neither can an executor, without confirmation, transmit his right, confirmation being the only *aditio hæreditatis in mobilibus*: and as, without confirmation, the nearest of kin could not be liable *passive* in payment of the defunct's debts; so neither could he without it have right *active*.

tive.

tive. Children have right to their legitim, except they be secluded therefrom either by their own renunciation, or by accepting a provision in full satisfaction of all that they can crave as their portion natural, or bairns part of gear. And in either of these cases they are foris-familiated, and out of the family, and so have no share with the bairns remaining in the family : and therefore if children get bonds of provision from the father in his *liege poustie*, they are not thereby excluded from their legitim, nor are they obliged to collate these bonds of provilion, and to impute them as a part of their portion natural ; but they have right to them as mere creditors, and may likewise seek their legitim. But if these bonds of provision were made to them upon death-bed, they cannot seek both the provisions of these bonds and their legitim ; for the father upon death bed cannot prejudice the relict nor the rest of his children of their respective shares ; and consequently these children, who are so provided upon death-bed, must collate with the re-

Collation.

liſt and the reſt of the children. But the heir has no ſhare in the moveables, except he collate, and be content that the reſt of the children ſhare equally with him in all that he can ſucceed to as heir, or in caſe there be but one child; for then that child is both heir and executor, without collation.

Executor
nominate

12. An executor nominate is *he who is named by the deſunct in his teſtament*; and is therefore likewise called an executor-teſtamentar: but if there be none named by the deſunct, then the commiſſary will make an executor-dative; and ordinarily they prefer the neareſt of kin; but if the neareſt of kin, being charged, will not confirm, then they name their own procurator-fiſcal executor: and if thereafter the neareſt of kin compear, they uſe to ſurrogate him; and this is called an executor ſurrogate.

Executor
creditor.

13. A creditor may confirm himſelf executor creditor, and ſo may purſue the deſunct's debtors: and leſt that creditors ſhould wrong one another by nimious diligence, our law has appointed, that all

all who shall confirm themselves executors-creditors, or shall do diligence against executors or intromitters * within six months one of another, shall come in *pari passu*.

* Act of
Sederunt,
28. Feb,
1662.

14. Executors-creditors are only obliged to confirm as much as may pay themselves; and are, for the same reason, only liable to do diligence for what they confirm.

15. Because moveables may be easily concealed from creditors, or dissipated; therefore the law appoints, that the executor shall upon oath give up inventory, and find caution to make these moveables forthcoming, and then the commissary confirms him; nor can he pursue or dispo-
ne as executor, till he be confirmed: he is only liable for the defunct's debt in as far as the goods confirmed will extend.

16. Executory being a meer office, it accresces to the survivors, if there be more executors: and in so far as the executors have not executed the testament in their own life-time, that is to say, have not obtained decreets for the goods belonging to the defunct, there will be place

for a new executor, for executing these; and they are called executors *quoad non executi*. Or if the executor omit to give up any thing in the inventory, or do not give up the saids moveables at the full rates; there will be another executor-dative appointed by the commissaries, who is called executor-dative *ad omiffa vel male appretiata*.

Special
legacy.

17. The executor only has power of administration; and the creditors and legataries can only pursue him, except where there is a special legacy left of such a particular thing, or a sum owing by such a particular person: for then the special legatary has the *dominium* transmitted to him, and so he may himself pursue for his special legacy; but the executor must be still called in the pursuit, to the end it may be known whether the debts exhaust the special legacies: for no legacy can be paid till the debts be paid; and therefore, if all the legacies cannot be paid, the legataries suffer a proportional defalcation for payment thereof; but if there be as much free goods as will pay the
the

the special legacy, there will be no defalcation.

18. An executor cannot dispoſe till he obtain a ſentence; but even the ſentence ſtates him not in the abſolute right of the moveables, otherwiſe than that he may diſcharge and aſſign to the reſpective perſons having intereſt: for, if he were denounced rebel, the executory goods, even after ſentence, would not fall under his eſcheat, nor would his executors or his creditors have right thereto, in prejudice of the neareſt of kin of the deſunct, to whom he was executor.

19. If there be more executors, whom we call co-executors, one cannot purſue without the reſt, for all of them repreſent the deſunct, only as one perſon; but if any of the reſt will not concur, they may be excluded from their office by a proceſs before the commiſſaries. Nor can an executor, for the ſame reaſon, diſcharge a debt wholly, ſince the reſt have an equal ſhare in each debt: but if the other executors have got as much as their ſhare will extend to, a diſcharge even from one of the executors

Co-executors,

executors will be sufficient. Nor are (for the same reason) co-executors liable for the whole debt, and so cannot be singly pursued, unless they have intromitted with as much as may pay the debt pursued for.

Diligence of executors.

20. An executor is liable to do diligence for recovering the debts due to the defunct, and the diligence required upon his part is a sentence and registered harning against the defunct's debtors: but if there be an universal or special legatary, whereby the executor confirmed has no advantage, then the executor is not liable in diligence, but only to assign to the creditors, that they themselves may pursue.

Privileged debts

21. The executor likewise cannot pay any debt without sentence, lest otherwise he might prefer one creditor to another. But yet the executor may pay those debts that are acknowledged in testament, without process, providing the same be paid before the creditors intent a pursuit. But these which we call privileged debts, may be paid at any time, even after process is intended at the instance of other creditors;

tors; because they are preferred to all others, viz. servants fees, medicaments on death-bed, house-mail, and funeral-expences.

22. After the executors have executed the whole testament, they may get a decret of exoneration before the commissaries, against the creditors and all having interest, wherein they may prove that all they got is exhausted by lawfull sentences: but it is not necessary to have such a decret when they are pursued before the lords, for it is sufficient when they are pursued there to alledge, that they are exhausted, by way of exception.

Decret
of exoneration,

23. If any person intromit with the defunct's moveables without being confirmed, they are liable to the defunct's whole debts, whether they were related to him or no, though their intromission was very small. And this was introduced to prevent the fraudulent and clandestine abstracting of the defunct's moveables, without inventory, in prejudice of creditors: and therefore this passive title is only introduced in favour of creditors,

Vicious
intromission.

tors, but of none others, such as legataries, bairns, &c. But if the intromitter confirm before any action be intened, this purges the vicious intromission, and the intromitter is only liable for the value of the goods intromitted with; or if there be an executor confirmed, no person can be pursued as vicious intromitter, for the intromitter then is only liable to the executor. But the relict or the defunct's children, confirming within year and day after the defunct's death, do thereby purge the viciousity, though they confirm not till after citation. Nor will necessary intromission infer viciousity; and that is called necessary intromission, when either the husband or the wife continue their possession of one another's goods after one another's decease, for preservation; and that because there is no other person to look after them: and this is for the advantage of the creditors, since it hinders the goods from perishing.

24. If there be more vicious intromitters, they are each liable *in solidum*, if they be pursued in several actions; and

pro

pro virili, if they be purfued together; but none of them get relief, for wrong in our law has no warrant.

25. The heir is obliged to relieve the executor of all heritable debts, and the executor is bound to relieve the heir of all moveable debts, as far as the inventory will reach.

Relief,
&c.

T I T L E X.

Of last heirs and bastards.

1. **W**Hilst there is any alive who can prove even the remotest contingency of blood to the defunct, they fucceed to him; but if there be none, the king fucceeds as last heir, for *quod nullius est, est domini regis*; and fo the king fucceeds to the defunct as last heir, both in heritage and moveables, and is preferred to all fuperiors and others whatfoever: for which end he makes a donatary, who muft obtain a declarator before the lords of feffion againft all who are fupposed to have any relation; whereupon a decreet being

*Ultimus
hæres.*

being obtained before the lords, declaring that the king has right as last heir, the defunct having died without any relation, this decret is equivalent to a service. But if lands be taken by a man to himself and his heirs-male simply, the king or other superior will succeed as last heir, if there be no heirs-male, though there be heirs-female, since the land was not provided to them; and therefore men ordinarily in their tailzies adject the clause, "Which failing, to their heirs whatsoever."

2. Because the king succeeds here as heir, therefore he is liable to pay the defunct's debts; but he is only liable as far as the estate will extend, and therefore the creditors may adjudge the real estate, and serve themselves executors-creditors in the moveables.

Bastardy.

3. A bastard by our law has neither heirs nor executors, but yet he may dispose upon either his heritage or moveables in his *liege poustie*; though he cannot make a testament, except he be legitimated by a letter under the great seal, (which extends not to heritage) or have children

children surviving him; for the bastard's children will always seclude the king.

4. The king, in the case of bastardy, makes a donatary, who pursues declarator, and is liable to the debt; for in effect, the king succeeds - here *quasi ultimus hæres*, and creditors use the same execution in this case as in the other: and in both *ultimus hæres* and bastardy the relict has still her share in the moveables, as in other cases.

5. Children procreated betwixt persons divorced, and these with whom they have committed adultery, cannot succeed to them *.

* Parl.
1600.
c. 20.

Y

THE

The first thing I saw when I stepped
 out of the car was a vast, open
 landscape. The air was fresh and
 the sun was shining brightly. I
 felt a sense of freedom and
 adventure. The road ahead was
 long and winding, leading me
 to a beautiful beach. The water
 was crystal clear and the sand
 was soft. I walked along the
 shore, feeling the gentle waves
 against my feet. The sun was
 low in the sky, casting a
 warm glow over everything. I
 took a deep breath and smiled.
 This was exactly what I needed.

[Faint, illegible text]

1911

THE INSTITUTIONS OF THE LAW of SCOTLAND.

BOOK FOURTH.

TITLE I.

Of actions.

1. **H**AVING finished these two first parts of the law which treat of persons and rights; we come now to treat of the third part, *viz.* actions, whereby these persons pursue those rights.

Actions.

2. An action is defined to be *a right of prosecuting in judgment what is due to us*: and it suffers very many divisions; the first whereof is, that some are real, and some personal. A personal action is that *whereby we only can pursue the person that is obliged to us*; as where I pursue a man for payment of a sum due by his bond. A real action is that

Defin. of actions.

Real and personal actions.

whereby a man pursues his right against all singular successors, as well as the person who was first obliged : as for instance, if one have an infestment of annualrent, he can not only pursue the granter for payment of the money by a personal action, but he can by a real action, called an action for pointing of the ground, pursue all singular successors, and point the tenants and intromitters with the rent, for recovering of his annualrent out of the land that stood affected with his infestment of annualrent. But, by the Civil Law, a personal action is said to be that which arises from a personal obligation; as a real action is that which arises from a real right, and is founded in *dominium* or property, and competent against any possessor or detainer of what is ours, called likewise *rei vindicatio*.

Improbation
and
reduction

3. Actions are also divided into ordinary actions, and actions rescissory : for with us all actions are called ordinary actions, except improbations, whereby we pursue papers to be declared false and forged; or reductions, whereby we pursue rights

rights to be declared null, and to be reduced.

4. In improbations there are two terms given to produce the writ, because the danger is great. And if the writer and witnesses of and in that writ be alive, their testimonies are only allowed as probation; which is called the direct manner of improbations: but if these be dead, the lords try the verity of the writ by strong presumptions and conjectures, which is called the indirect manner of improbation. But because in reductions the writ called for is only to be declared null till it be produced, therefore in these there is only one term granted for producing.

Terms of improbation.

Direct manner of improbation.

Indirect manner of improbation.

5. No certification will be granted against any writs made by the pursuer and his predecessors and authors, except he be served heir to these predecessors, and produce a right made by these authors. But certification will be granted against any rights made to the defenders or their predecessors, to whom they may succeed *jure sanguinis*, or to their authors, or to

Certification in improbation.

any to whom these authors may succeed *jure sanguinis*, if any person be called to represent these authors.

6. The ordinary reductions are *ex capite inhibitionis*, whereby we pursue rights to be declared null, as granted after inhibition is raised by us; or *ex capite interdictionis*, if granted after interdiction is raised by us; or *ex capite vis & metus*, if the rights were extorted from us by force; or *ex capite fraudis*, if the rights were elicited from us by circumvention, in both which last the pursuer must libel the qualifications or circumstances from which the force or fraud are inferred; or *ex capite lecti*, if the deeds were done upon death-bed, in prejudice of an apparent heir; or upon the act of parliament 1621 †, if the deeds were done in prejudice of prior lawful creditors, in favour of conjunct or confident persons, that is to say, relations or trustees, without an onerous cause; or to a creditor, though for an onerous cause, in prejudice of another who had done prior diligence, that was habile to affect the subject disposed. All which

† Cap. 18.

which, and many others of that nature, are opposed to ordinary actions; because they are extraordinary remedies invented by law, for the preservation of mens rights; and are called extraordinary, because they are never competent, till other ordinary remedies fail.

7. Actions of reprobatur and error are in effect reductions, and must have the concurrence of the king's advocate: in the first whereof a party against whom witnesses have deponed unjustly, craves the decreet pronounced upon these depositions to be reduced, because the witnesses have deponed falsely *circa initialia testimoniorum*; and condescends in his reasons of reduction upon the particulars wherein they have deponed falsely; and also concludes that the testimonies should be reprobated.

Reprobatur.
tour.

8. In the summons of error the pursuer craves that a service (whereby the defender is served heir to such a man) ought to be reduced, because the pursuer is a nearer relation to the defunct than the person wrongously served, upon which

Summons of
error.

be

he condescends; and therefore concludes, that the service and all following thereupon may be reduced, and that it may be found that the inquest who served him heir have erred. And this is the only summons that is drawn in Latin with us.

**Actions
prejudi-
cial.**

9. Some actions are called preparatory or prejudicial actions, because they must be discussed before other actions are competent: as for instance, if I pursue for a sum, and the defender raises an improbation, alledging the writ to be false, the trial of the falshood must be first discussed, and so is prejudicial to the action of payment.

**Exhibi-
tions.**

10. Exhibitions conclude either merely to exhibite the writ, or the thing called for; and then it is only a preparatory action, such as exhibitions *ad deliberandum*; or else they conclude delivery. And in all exhibitions the ordinary terms libelled are, that the defender had, has, or has fraudfully put away the papers or things craved to be exhibited; and therefore he is not obliged to exhibite, except he had them since the citation, or fraudfully put them away, to elude a future citation.

11. Some

11. Some actions are called *actiones bonæ fidei*, in which equity is followed, as actions upon mandates, depositions, emption, location, &c. in which the judge considers what in equity is to be done by one party to another. And some actions are *stricti juris*, in which the judge is to follow the strict prescript of the contract upon which the action is raised, as in a declarator of redemption, wherein the pursuer craves that it may be declared that he has lawfully redeemed the lands that were wadsetted; in which case the judge must consider the very precise terms of reversion, and that the lands were redeemed conform to these terms: nor is equipollency relevant in these cases.

Actiones bonæ fidei.

Actiones stricti juris.

12. Some actions are called *rei persecutoriæ*, by which we pursue that *quod patrimonio nostro abest*; which is commonly called damage and interest.

Rei persecutoria.

13. Some are called penal actions, because we pursue not only for repetition and real damage, but for extraordinary damages, and reparation by way of penalty;

Penal.

nalty; such as are spuilzies, actions for violent profits, &c.

Arbitra-
ry.

14. Some actions are called arbitrary actions, wherein the judge is tied to no particular law, but proceeds *ex nobili officio*; that is to say, according to what he sees just and fit; as an action for proving of the tenor of an evident, wherein the complainer libels, that he had such a paper, (of which he must libel the full tenor *verbatim*) and that he lost it by such an accident; and therefore concludes, that the tenor may be proven by witnesses, and adminicles in writ, which he must libel; for no tenor can be proven without some adminicles in writ. And generally, there being many things with which the law behoved to trust the discretion and honesty of the judge, since all cases could not be comprehended under known laws; it therefore invested the judge with this eminent power, which is called *nobile officium*, in opposition to that *officium ordinarium & mercenarium*, wherein he is obliged to follow the will of the contracters precisely. *Et hoc officium*

*cium mercenarium judex nunquam imper-
tit nisi rogatus.*

15. Some actions are called declarators, because the pursuer concludes in them that some special thing should be declared in his favours: and ordinarily where-ever the king, or any other superior, grants a gift, he to whom it is granted pursues a declarator, craving it may be found and declared that the casualty gifted to him has fallen in the superior's hands, and that he has right thereto by virtue of the gift: and thus declarators must be raised upon escheats, marriages, non-entries, &c. only there needs no declarator upon a gift of ward and of forfeiture, when past in parliament; but if the forfeiture be past before the justices, the gift must be declared. And on gifts of escheat they sometimes raise actions both of general and special declarator in one summons. In the general the pursuer concludes, that it should be found and declared that the rebel was lawfully denounced to the horn, and that thereby his escheat fell in the superior's hands: and in the special he concludes,

Declara-
tors.

concludes, that the tenants of the rebel's lands, whose escheat is fallen, may pay him the mails and duties by virtue of his gift and decret of general declarator. But though this last action be called an action of special declarator, it is in effect but an action of mails and duties. In other cases also, where any thing is craved to be found and declared as a right arising upon a special matter of fact, for which no other action can be found that has a special name, lawyers do now cause raise actions of declarator, or at least cause adject conclusions of declarator to other actions, such as reductions, &c. and these are the same with the *actiones in factum* mentioned in the Civil Law.

Civil actions.

16. Some actions are called civil, wherein men prosecute their civil rights; and some criminal, wherein men prosecute crimes, *ad vindictam publicam*.

17. For further clearing of actions, and how they ought to be libelled, I shall shortly explain the nature of a summons, and shall set down some of those actions which

which have special names and conclusions.

18. The chief parts of a summons are the pursuer's interest or title, that is to say, the right standing in his person, whereby he has good interest to pursue the action he has intended.

Nature
of a sum-
mons.

19. 2do, That all the persons who should be called as defenders, be called in the summons. And since it is a relevant exception against a summons that all persons having interest are not called, therefore it follows clearly that, for the more security, it is fit to call all persons who may be concerned in that process.

20. 3tio, The *medium concludendi*; that is to say, *the ground whereupon the persons called are liable to pay and perform what is craved.*

*Medium
concluden-
di.*

21. 4to, After all this is narrated, the king in the summons says, "Our will is, &c. that ye cite such and such persons, &c." which is called the will of the summons; and which will of the summons does comprehend a command to the messenger to cite the defenders, and expres-

Will of
the sum-
mons.

Conclu-
sion.

* Parl.
1585.
c. 13.

Tran-
sumpts.

ses the number of days upon which they are to be cited, and the places to which they are to be cited, and before whom they should compear; as also the conclusion craved by the pursuer. Each of which summonses almost has its own special stile and terms; and, by act of parliament, writers are commanded not to alter the antient stile*.

22. It is observeable, that though the matter of fact be ordinarily narrated before the will of the summons, yet summonses of reduction, improbation, spuilzie, and declarators of non-entry, begin at "Our will is, &c." and then go on to the interest of the pursuer, &c.

23. In a summons of transumpt, the pursuer (who in the summons is always called the complainer) libels, that he has right to the lands whereof he craves the papers to be transumed, and that therefore it is necessary to him to have doubles and transumps of the rights, and this is the pursuer's interest; and that the defender has these rights, or is obliged to procure him transumps; and therefore concludes,

concludes, that the defender should be obliged to exhibit and produce them, to be judicially transumed, and the authentic transumps to be declared as sufficient for the security of the pursuer in the said lands, as the original writes themselves.

24. In a summons of multiple-poin-
ding, the complainer having narrated, that he is troubled by such and such persons, who do each of them pretend right to a sum in which he is liable; he therefore concludes against all of them, to compare to hear and see the same tried; and the party who shall be found to have best right to be preferred, and the other party to be discharged from troubling or molesting him in all time coming.

Multiple-
poin-
ding.

25. In a summons of transferring, the pursuer libels, that there was a depending process at the instance of his predecessor, whom he represents, against the defunct, whom the debtor represents; which process must be narrated *verbatim*: and if the pursuer's predecessor be dead, craves that the process be transferred *active* in his person, as representing the defunct;

and when the defender is dead, the same is transferred against his representatives *passive*. The conclusion of transferences is, that such action may be competent to the pursuer as heir to the defunct, against the representatives of the defender, as was competent to the pursuer's predecessor; and that the said action may go on and be continued in the same manner as it would have done against the defunct, whom the defender represents.

26. Transferences are privileged actions, coming in upon six days.

27. If any person, subscriber of a bond or a contract, be dead, the procuratory consenting to the registration expires; and therefore the writ cannot be registered otherwise than by raising a summons of registration against the representatives of the granter, upon the passive titles, in which the whole tenor of the writ craved to be registered is set down *verbatim*: and then it is concluded that the said writ should be inserted and registered in the books of council and session, for conservation; and that execution should be direct

Sum-
mons of
registra-
tion.

rect thereupon, in manner mentioned in the said writ; and that the said representatives should be liable in payment. But this action is ordinarily supplied by an ordinary action for payment.

28. In a summons of *prævento*, the complainer narrates, "that he having raised letters of horning, the same were suspended upon most frivolous reasons, to a very long day;" and therefore concludes, "that the defender should bring with him the said suspension, the day of , *prævento termino*, to hear and see the same called, reasoned and discussed; with certification, that if he fail, the lords will cause call the suspension upon a copy, and admit protestation therein, and ordain the letters to be put in further execution."

Prævento

29. If an advocation be raised to too long a day of compearance, there may be likewise a summons of *prævento* raised thereof.

30. In a summons of contravention of laborrows, the pursuer libels, "that A. B. became surety and laborrows for C. D. that the complainer, his wife, bairns, men,

Contra.
of labor-
rows.

tenants and servants, should be harmless and skaitheless in their bodies and lands, &c." and then subsumes upon the prejudice done, notwithstanding of the said caution: and therefore concludes, "that both the principal and cautioner should be decerned to have contravened the said act of caution, in manner foresaid; and therethrough that they conjunctly and severally have incurred the foresaid pain, the one half to the king and his treasurer, and the other half to the complainer, as party grieved *."

* Par.
1579.
c. 77.
Par.
1593.
c. 170.
Parl.
1581.
c. 117.
Declar.
of pro-
perty.

31. In a declarator of property, the complainer narrates his right to the lands, and how long and after what manner he and his authors have been, by themselves, their tenants, and others having right from them, in the peaceable possession of the said lands, until of late that he is molested and troubled by the defender: and therefore concludes "that it should be found and declared that he has the sole, good and undoubted right and interest in and to the saids lands; and that therefore the said defender, and his tenants and servants,

vants, and others of their causing and commanding, should be decerned not to trouble nor molest them for the future in the peaceable possession, bruiking and joising thereof."

32. If the complainer designs only to maintain his possession, without bringing his property in controversy, he raises a summons of molestation, in which he only concludes, "that they should desist and cease from troubling and molesting him in the peaceable possession of his lands."

Sum-
mons of
molesta-
tion.

33. In a summons for poinding the ground, the pursuer narrates, "that he stands infest and seased in an annualrent of , to be uplifted out of the lands of ;" and therefore concludes against the tenants of these lands, and the heritor for his interest, "to hear and see letters directed to messengers at arms, sheriffs in that part, to fence, arrest, apprise, compel, poind and distrenzie the readiest goods and gear that are presently upon the lands, and yearly and termly in time coming, during the not redemption of the annualrent."

Poinding
of the
ground.

34. In

Spuilzie.

34. In a summons of spuilzie, the king commands "messengers, &c." (which is the stile of all summonses which begin with "Our will is") "to summon, warn and charge the defenders to compare and answer at the instance of the pursuer, against whom the spuilzie after specified was committed; that is to say, the defenders for their wrongous, violent and masterful coming by themselves, and their servants, complices and others in their name; of their causing, sending, hounding out, command, reset, assistance and rathabition to the lands of upon the day of ; and for their wrongous, violent and masterful spuilziation of the goods" (to be condescended on): and then concludes, "that they should pay the prices, extending to and the profits that the complainer might have made of the saids goods daily, since the said spuilziation, extending to , " &c.

Waken-
ing.

35. In a summons of wakening, the complainer, after narrating that he had raised such a summons, which he had suffered to ly over and sleep for a year (for there

there needs no wakening if there was any judicial act or minute upon the summons within the year): therefore concludes against all the persons cited in the first summons, "to hear and see the foresaid action called, wakened and begun where it was last, insisted upon, and justice administered therein, till the final decision of the cause."

36. A furthcoming is that action wherein the arrester libels, "that he having raised letters of arrestment, he caused messenger lawfully fence and arrest all debts owing by the defender to his debtor to remain under arrestment, and to be made furthcoming to him:" and therefore concludes, "that the defender should be decerned to make furthcoming, payment and delivery, to the said complainer of the sum of _____, adebted, restand, owand by him to the said debtor."

Furth-
coming.

37. If, notwithstanding of the arrestment, the debtor pay his own creditor, he will be liable to the arrester, and will be forced to pay him what he was resting to his own creditor: and likewise he may
be

Breaking
of arrest-
ment.

† Parl.
1581.
c. 118.

Accumu-
lation of
actions.

be pursued for breaking of arrestment, wherein, after the arrestment and payment is narrated, the pursuer concludes, "that the defender should be decerned to have broken the arrestment then standing, and not lawfully and duly loosed; and therefore to be punished in his person and goods, conform to the laws of the realm, in example of others †."

38. Though the accumulation of several actions into one libel was not allowed by the Civil Law, yet it is allowed by ours, in which we may not only pursue several persons for several debts in one libel, which we call by a general name, an action against debtors; but we may likewise accumulate several conclusions against one and the same person, though they be of different natures, as reductions, improbations, and declarators of property, and actions of general and special declarator; in all which it is a general rule, *quot articuli tot libelli*.

39. But when many actions are competent for one and the same thing, as if a messenger be deforced, we may pursue
the

the deforcer criminally, which will infer confiscation of moveables, or civilly for payment of our debt; and the pursuing of the one does not extinguish or consume the other: and either the criminal or civil action may be first pursued. And in the concurrence of all actions, if the actions which concur have different conclusions, as in the foresaid instance, where the criminal action of deforcement concludes confiscation, and the civil action only payment; though the defender be assolized in the criminal process, yet he may be pursued civilly, and the deforcement referred to his oath.

*Concurfus
actionum.*

*Deforce-
ment.*

T I T L E II.

Of probation.

1. **F**OR understanding the matter of probation, it is fit to know, that all probation is either by writ, by oath, or by witnesses.

Probation

2. Probation by writ has been formerly

By writ,

ly

ly explained in the title concerning *Obligations by writ.*

By oath.

3. Probation by oath is *when either the party or judge refers any thing to the oath of the contrary party*: but regularly no man's right can be taken away by oath, except he who has the right refer the same to the adversary's oath; but when there is a former probation already adduced, the judge sometimes gives an oath of supplement, which is so called because it is given to supply the probation already led, when it is defective or unclear.

Oath of
supple-
ment.

Oath of
calumny

4. An oath of calumny is *that whereby either the pursuer or defender is obliged to swear that the pursuit, defence, reply, &c. are not groundless and unjust*: and this may be craved by either party at any time during the dependence; and if it be refused, the pursuer will have no further action, nor the defender will not be allowed to insist any further in the defence, duply, &c. whereon his oath of calumny is craved *.

* Parl.
1429.
c. 125.

5. An

5. An oath *in litem* is that which law allows the judge to defer to him who is injured, for proving the quantities of the thing wherein he is injured: v. g. If I pursue Titius for having broke up my trunk, and I having proved that he did break it up, the judge will refer to my oath what I had in the trunk. And this is allowed both in odium of him who commits the injury, and lest the person injured should lose his right for want of probation.

Oath *in litem*.

6. A qualified oath is that whereby he to whose oath any thing is referred, depones not simply; but circumstantially; which we call to depone with a quality; v. g. If I pursue Titius for payment of L. 100. which he promised to pay, who compears and depones, that the promise was conditional, and did depend upon something to be done or performed by the pursuer, as that, *intuitu* of the promise, the pursuer was to make over some right to him, or discharge some obligation or right standing in his person. And those qualified oaths generally are admit-

A qualified oath.

A a

ted,

ted, if the quality be intrinsic, that is to say, necessarily implied in the nature of the thing, or is a part of the promise; as in the foresaid instances.

7. But if the quality be extrinsic, it in effect resolves in a defence, and so must be proven otherwise than by the qualified oath: as, if a debt be referred to a party's oath, who depones that he acknowledges the debt, but that the pursuer is resting to the deponent the equivalent sum with which he would compensate the sum pursued for; this will not be admitted as a quality, but is in effect a defence, which must be proven otherwise than by his oath.

Probati-
on by
witnesses

8. Probation by witnesses having been allowed in all cases of old, until the falseness of men forced our lawgivers to allow nothing above L. 100. to be proven without writ or oath, and promises to be only proven by oath; this probation by witnesses is therefore called *probatio prout de jure*. And it is fit to know, that none within degrees defendant, that is to say, who are cousin-germans, or nearer relations,

Inhabile
witnesses

tions, can be witnesses; nor women, nor tenants who have not tacks, nor persons declared infamous, nor domestic servants, nor such as may gain or lose by the cause, nor such as have given partial counsel, that is to say, advice to raise or carry on the pursuit; nor such as have told what they will depone, which we call *prodere testimonium*; nor such as compear to depone without being cited, whom the law calls *testes ultraneos*, and rejects them because of their suspected forwardness. All others except these may depone, and are called habile witnesses. And if habile witnesses refuse to come when they are cited, there will be first horning and then caption directed against them, which are called first and second diligences; but their escheats will not fall upon that horning.

9. Presumptions are a kind of probation; and a presumption is defined to be *a strong ground or argument, whereby a judge has reason to think or be convinced that such a thing is true.* And they are divided into *præsumptiones juris*, which

Presump-
tion.

though they be strong, yet may be taken off by a contrary probation; as if a man threaten to poison another, if the person was thereafter poisoned, it is presumeable that he was poisoned by the threatner: and *præsumptiones juris & de jure, ubi lex constituit super præsumpto*; and thus the law presumes that an ultroneous witness, who offers himself, is partial, and therefore statutes, upon that presumption, that he shall not be received. And against these presumptions no probation can be admitted.

T I T L E I I I.

Of sentences, and their execution.

I. **A**FTER a decret is extracted, the obtainer thereof raises letters of horning thereon, whereby the party concerned is charged to pay or fulfil the will of the decret, under the pain of rebellion; and this decret can only be quarrelled by reduction or suspension, in both which the reasons whereupon it is quarrelled are set down. Nor can a decret
of

of the lords be taken away without reduction: and if there has been a debate in the first instance, (for so we call the action before the decret, as we call reduction and suspension the second instance) then nothing that was competent to have been proponed before the decret will be admitted, but will be repelled as competent and omitted; for else there should be no end of debate. But yet, if any thing has newly emerged, or has newly come to the party's knowledge, that is and must be received, if he depone that he knew not the same formerly.

2. The ordinary effect of a suspension is to stop the execution of sentences for a time; and it is *a summons wherein the party alledged injured by a decret doth cite the party who has obtained the decret before the lords*, (for no inferior court can suspend) *to answer to the reasons offered by him for suspending execution upon that decret*: which summons proceeds upon a bill, wherein the reasons are represented to the lords; for though sometimes the lords ordain the

Suspension.

reasons to be debated upon the bill, yet ordinarily they ordain letters of suspension to be raised. If the decreets be *in foro*, then the suspension must pass by the whole lords in time of session, and by three lords in time of vacance; but other decreets may be suspended by any one lord.

3. There are other reasons allowed to be insisted on beside these in the bill, and these are called eiked reasons: and a man may suspend upon new reasons as oft as he pleases, for competent and omitted is not received against suspensions. But if the reason of suspension be founded on compensation, the same must be proposed in the first instance, and before the decret be extracted *, otherwise it will be repelled as competent and omitted.

4. If the suspension be called, discussed, and the letters found orderly proceeded, that is, ordained to be put to further execution, then letters of caption may be raised, whereby all the inferior judges and magistrates are ordained to concur with the messenger in apprehending the rebel, and putting him in prison: which if they refuse,

* Parl.
1592.
c. 143.

refuse, or if the prisoner thereafter escape out of their prison, they are liable to pay the debt by a subsidiary action.

5. Decrets are executed likewise by pointing and arrestment, upon the warrant in the letters of horning, which are fully treated in their proper places. *Vide supra*, tit. *Arrestments and pointings*. Tit.

6. Book III.

6. As to execution of immoveable goods, which is by comprising and adjudication; the same is formerly treated, Book II. Tit. 12.

7. If the decret be to remove from lands, then the party decerned to remove, being denounced rebel for not removing, the sheriff or judge ordinary is charged to eject; who comes to the land, and puts out the fire, or casts out some of the ploughing. But if a man continue to possess in spite of all law, after he is legally ejected, the privy council will give letters of fire and sword to the party injured, commissionating the sheriff, and others whom he will name, to dispossess him by the sword, to raise fire, and use all other severities;

Letters
of ejection.

Letters
of fire
and
sword.

verities; for which the commission does indemnify them.

8. If such as have debateable rights chuse rather an amicable than a judicial decision, they subscribe a submission to arbiters, and, if they please, to an oversman, and another blank on the back of the submission, wherein they may fill in their decret-arbitral: and though it be free to these arbiters to accept, yet, if they once accept, the lords will grant letters of horning to force them to decide.

9. Though these arbiters are not tyed to the strict solemnities of law, yet they must observe material justice; and therefore they must advertise parties that they may give in claims, (for a claim to arbiters is in place of libels to judges) and must allow terms to prove. And tho' equity is to them a rule, as law is to other judges, yet, if either party be enormously lesed, the lords will suspend and reduce their decreets. If the submission bear no special day betwixt and which they are tyed to decide, they must decide within a year of the submission; and if

witnesses

Decreet-
arbitral.

witnesſes will not voluntarily appear before them, the lords will upon a bill grant letters of horning to force them to appear, as they will againſt the arbiters themſelves, if they reſuſe or delay to decide, and to give forth their decreet-arbitral.

10. Another ordinary way now uſed is, that the one party grants a blank bond, and the other a blank diſcharge, to be filled up by the arbiters, without any ſubmiſſion.

TITLE IV.

Of crimes.

1. **C**Rimes are either private, where the injury is committed againſt private perſons; or public, where it is committed immediately againſt the commonwealth.

Crimes.

2. Private crimes, called alſo *delicta* in the Civil Law, oblige the committers to repair the damage and intereſt of the private party.

Delicta.

3. Crimes

3. Crimes are in Scotland punished either capitally, by death; or pecunially, by a certain fine; or arbitrarily, at the discretion of the judge.

Capital crimes are,

Treason.

4. Treason, which is punished by forfeiture of life, lands and goods.

5. It is treason in any man to plot, contrive or intend death or destruction to the king's majesty; or to lay any restraint upon his royal person; or to deprive, depose or suspend him (*a*): or to endeavour the alteration or diversion of the succession (*b*): to levy war against the king, or any commissioned by him; or to entice others to invade him (*c*): to make treaties or leagues with foreign princes, or amongst themselves, without his consent (*d*): to rise, in fear of war, against the king; to raise a fray in his host (*e*): to assail castles where he resides (*f*): to impugn the authority of the three estates; to decline the king's authority: not to come out to the king's host, or to desert

(*a*) Parl.

1449.

c. 25.

Parl.

1662.

c. 2.

(*b*) Parl.

1681.

c. 2.

(*c*) Parl.

1662.

c. 2.

(*d*) Parl.

1661.

c. 3, & 5.

(*e*) Parl.

1455.

c. 54.

Parl.

1449.

c. 25.

(*f*) Parl.

1584.

c. 129,

130.

sert it (a); to maintain or reset traitors (b):
to conceal treason; to counterfeit the
king's coin; and to raise wilful fire (c);
all which are species of high treason.

6. We have a kind of treason in Scotland which we call statutory treason, because it is merely introduced by statute, and not by Common Law, *viz.* theft in landed men (d), because of the danger of that kind of theft: murder under trust (e); as if one man should kill another when he invites him to his house; or a tutor should kill his pupil, which, because of the easiness and atrociousness of the crime, is made treason: the firing of coal-heughs (f): assassination (g): and the pursuing another for treason without being able to prove it (h). All Jesuits, seminary priests and trafficking Papists (i); and all thieves who take bonds from leal and honest men, for re-entering when they please; all who purchase benefices at Rome, are guilty of treason (k).

7. No crime can be pursued against a man, or his heirs, after his death, except that

(a) Parl.

1424.

c. 4.

(b) Parl.

1449.

c. 25.

Parl.

1592.

c. 146.

(c) Parl.

1528.

c. 8.

Stat.

treason.

(d) Parl.

1587.

c. 50.

(e) Parl.

1587.

c. 51.

(f) Parl.

1592.

c. 148.

(g) Parl.

1681.

c. 15.

(h) Parl.

1587.

c. 49.

(i) Parl.

1592.

c. 122.

(k) Parl.

1471.

c. 43.

Parl.

1493.

c. 39.

that treason which is committed against the king's person or commonwealth.

8. A traitor being forfeited, not only all the lands he holds of the king, but all the lands he holds of any other superior, fall to the king, because the crime is committed against him. But because the king cannot hold lands of any other superior, therefore he does, by a letter of presentation under the quarter-seal, present a donatary to the superior, who is to be vassal to the superior in place of the person forfeited. And this method of presentation the king uses also in the cases of bastardy and *ultimus hæres*.

9. Not only the lands disposed to the person forfeited, but all the lands disposed to sub-vassals, who are not confirmed, fall to the king: for the lands return to the king in the same condition they were disposed by his majesty or his predecessors, without being burdened with any right except these to which he has consented. Nor is the king obliged to acknowledge tacks, though made and clothed with possession before committing of the

the crime, except the tack be set for a suitable tack-duty. The king is obliged to pay no debt, though contracted for onerous causes, before the committing of the crime; except the creditor have a real security therefor, confirmed before the crime was committed.

10. The other capital crimes are blasphemy, man-slaughter or homicide; for all homicide is capital with us, except it be casual (*a*), or homicide in self-defence.

11. Theft (*b*) is punishable by death; but we call small theft pickery, and it is only punishable arbitrarily (*c*).

12. Notour adultery, that is to say, where there are children of the marriage, or where the adulterers converse openly at bed and board, or, being discharged by the church to converse, do continue to converse, is punishable by death (*d*); but simple adultery is only punishable arbitrarily: incest (*e*); buggery; duels (*f*); the invading of any of his majesty's officers for doing his majesty's service (*g*); forgery (*h*); witchcraft and the consulters

(*a*) Parl.
1661.

c. 22.

(*b*) Parl.

1587.

c. 83.

(*c*) Parl.

1474.

c. 59.

Parl.

1607.

c. 3, &c.

(*d*) Parl.

1563.

c. 74.

Parl.

1581.

c. 105.

(*e*) Parl.

1567.

c. 14.

(*f*) Parl.

1600.

c. 12.

B b

Of

(*g*) Parl. 1600. c. 4. (*h*) Parl. 1540. c. 20. and 1551. c. 22.

(a) Parl.
1563.
c. 73.

(b) Parl.
1424.
c. 5, 7.
Parl.

1477.
c. 77.

(c) Parl.
1594.
c. 196.

(d) Parl.
1579.
c. 76.

(e) Parl.
1482.
c. 88.

(f) Parl.
1424.
c. 10.

(g) Parl.
1424.
c. 36.
Parl.

1567.
c. 16.
(h) Parl.
1607.
c. 3.

(i) Parl.
1457.
c. 56.

of witches (a); forners, that is to say, such as masterfully take meat and drink from the king's people, without payment (b): all wilful hearers of mass (c); and concealers of the same: mutilation (d), which is the disabling of a member (though, *de praxi*, this be ordinarily punished with an arbitrary punishment): or the authors of infamous libels, seditious speeches, tending to sedition; the strikers of any judge in judgment; mixers of wine (e); and committers of hamesucken, by which we understand the assaulting or beating any man in his house.

13. The crimes to be pecuniarily punished are the slayers of red-fish (f); killers of does, deer, roes (g); destroyers (h) of bees-hives, fruit-trees, green-wood; kindlers of muir-burn, from the last of March till Michaelmas; steeping of green lint in running waters, or lochs; such as are guilty of abominable oaths; and fornication.

14. Crimes to be arbitrarily punished at the discretion of the judge are, negligence in the king's judges and officers (i); and such as unjustly murmur against them;

them (a); breakers of the king's protection (b); the bringing home of erroneous books (c); and the troublers of churchmen; craftsmen who wrongously refuse to fulfil the work which they have taken in hand (d); verbal injuries and scandals against private parties.

15. It is fit to know, that no punishment left arbitrary by the law to the discretion of the judge, can be by him extended to death; and that where-ever the law appoints death to be inflicted, the offender's moveables fall to the king, tho' the law does not express the same, and though the sentence express not the confiscation.

16. There are other crimes, whereof the punishment is not reduceable to any of these kinds; and thus perjury and bigamy (which is a kind of perjury, because a man who marries two wives breakes his matrimonial oath) are punishable by confiscation (e) of all the offender's moveable goods, imprisonment and infamy.

17. Deforcers of messengers and break-

B b 2

ers

(a) Parl.

1540.

c. 184.

(b) Parl.

1433.

c. 134.

(c) Parl.

1581.

c. 106.

n. 1.

(d) Parl.

1426.

c. 80.

Parl.

1540.

c. 111.

(e) Parl.

1551.

c. 19.

(a) Parl.
1581.
c. 118.
Parl.
1592.
c. 152.
(b) Parl.
1592.
c. 150.

ers of arrestment are punishable by confiscation of all their moveables (a); fore-stallers of markets (b), by buying things before they be presented to the market, or before the market be proclaimed, are punishable by imprisonment and confiscation of what is bought.

(c) Parl.
1587.
c. 52.
Parl.
1594.
c. 222.
Parl.
1597.
c. 251.

18. Ocker, or usury (c), which is the taking more than the annualrent allowed, or the taking annualrent before the term of payment, is punished by escheat of moveables. and by loss of the principal sum, for the debtor is to be free from the obligation; and the writ being reduced, the sum belongs to his majesty.

(d) Parl.
1540.
c. 105.

19. Stellionat, or the making of double rights, is punished by infamy (d); and their persons are at the king's will.

(e) Parl.
1449.
c. 23.
Parl.
1579.
c. 88.

20. The keepers of victual to a dearth are punishable as ockerers (e); and by the Civil Law, *per leg. Jul. de Annona*, bringing of judges is punishable by infamy and deprivation. Plagium, or the stealing of men, is a particular crime by the Civil Law, but is a species of theft with us. And theftboot, which is the saving

a thief by feigning with him, is punishable as theft (a). Baratry (b), or the obtaining benefices from Rome, is punishable by banishment and infamy. Ambitus, or the obtaining offices by unjust means, is not punishable under monarchy.

(a) Parl.
1525.

c. 2.

(b) Parl.

1567.

c. 2.

Parl.

1579.

c. 71.

21. By our law, when the pursuer raises a criminal summons, he must find caution to report the criminal letters, indorsed and execute; and the cautioner must either enact himself in the books of adjournal, (for so we call the registers of the justiciary) if he be present, or he must send a bond to be registrate there, if he be absent, under the pains contained in the act of parliament (b): and the defender is by the letters commanded to find caution in the saids books, within six days after the said letters are execute against him; which finding of caution he must intimate to the messenger who cites him, else that messenger may denounce him for not finding caution.

(b) Parl.

1535.

c. 35.

22. The defender in all crimes is allowed to have letters of exculpation for leading witnesses for proving of his own innocence.

nocency, which he must raise and execute against the day of compearance, to which he himself is cited, for all diets in criminal courts are peremptory. And there are no diets allowed for further probation, either to pursuer or defender.

23. All probation in criminal causes must be very convincing and clear, because of the severity of the conclusion. But sometimes witnesses, otherwise inhabile, are allowed, because of the danger of the commonwealth, as in treason; or because the crime cannot be otherwise proven, as in hamesucken.-

24. The justices are the only judges to all points of relevancies, and even to the objections against the witnesses; and they remit to an inquest of 15 chosen men, out of 45, to judge what is proven; and this inquest may condemn upon their own knowledge, they being in our law both judges and witnesses: and, if they condemn, their verdict (for so their sentence is called) cannot be quarrelled, nor they for condemning; but if they absolve, after clear probation led, they may be punished

nished with infamy, and confiscation of moveables.

25. The punishment of crimes is taken off either by remission, which must pass the great seal, and must express the greatest (a) crime for which the remission is granted; or by indemnities, which is a general remission granted by the king and parliament: betwixt which two there is this difference, that the obtaining a remission does not free the obtainer from assything (b) the party, that is to say, from repairing his losses; since it is presumed the king does only discharge what belonged to him, which is *vindicta publica*; but not what is the interest of private parties, or *vindicta privata*. But because all the people are represented in parliament, the king and parliament may by their indemnity discharge both the one and the other.

26. He who founds on a remission acknowledges the crime, but he who founds on an indemnity does not.

27. The king likewise restores men sometimes against forfeitures: which restitution

(a) Parl.
1503.
c. 62.

(b) Parl.
1457.
c. 74.
Parl.
1528.
c 7.

stitution is either by way of justice, finding that the person was unjustly condemned, and then the person condemned is restored to all that ever he had; and he recovers not only his fame, but his estate, though transmitted to third parties: or, *2do*, The restitution is by way of grace and mere favour; and then the party condemned cannot recover what was bestowed by the king upon third parties (*a*); for the king cannot recal what was once legally and warrantably granted to him.

(a) Parl.
1606.
c. 4.

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